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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

DAYTON AREA VISUALLY IMPAIRED PERSONS, INC., an Ohio non-profit corporation; WAYNE COUNTY FOSTER PARENTS NETWORK, an unincorporated Ohio non-profit association; OHIO TELEMARKETING ASSOCIATION, INC., an Ohio non-profit corporation,

Petitioners,

v.

LEE FISHER, Attorney General, State of Ohio; J. ANTHONY SAWYER, City Attorney of the City of Dallas, Ohio; LEE FALKE, Prosecuting Attorney, Montgomery County, Ohio,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a State may constitutionally exempt from professional-fundraiser regulation campaigns by charities that employ in-house professional fundraisers, while heavily regulating campaigns by those charities – generally the smaller and less popular ones – that employ outside professional fundraisers.

2. Whether exemption of all charities supervised by churches and all churches from extensive regulation of fundraising is an unconstitutional establishment of religion and an impermissible content-based regulation of speech.

3. Whether a charity and its professional fundraiser engaged in speech fully protected by the First Amendment may be compelled to make statements that impair effective communication.

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all the parties to the proceeding. There is no parent or subsidiary company to be listed pursuant to S. Ct. R. 29.6.

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Dayton Area Visually Impaired Persons, Inc., an Ohio non-profit corporation; Wayne County Foster Parents Network, an unincorporated Ohio non-profit association; and Ohio Telemarketing Association, an Ohio non-profit corporation, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 70 F.3d 1474, and is reprinted in Appendix A. The opinion of the District Court is not reported. It is reprinted in Appendix B.

STATEMENT OF JURISDICTION

The judgment sought to be reviewed was entered by the United States Court of Appeals for the Sixth Circuit on November 16, 1995. There was no petition or order respecting rehearing, and there has been no extension of time sought or granted to file this petition. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides, in part, as follows: "Congress shall make no law respecting an establishment of religion, or

prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press. . . . "

2. Section 1 of the Fourteenth Amendment to the United States Constitution provides, in part, as follows: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. Chapter 1716 of the Ohio Revised Code is reprinted in Appendix C.

STATEMENT OF THE CASE

A. Nature of the case, course of proceedings, and disposition.

Three organizations, the Dayton Area Visually Impaired Persons, Inc., the Wayne County Foster Parents Network, and the Ohio Telemarketing Association, brought the underlying action pursuant to 42 U.S.C. § 1983, challenging the constitutionality of the Ohio charitable organizations statute, Ohio Revised Code chapter 1716, which became effective on November 7, 1990, and seeking declaratory and injunctive relief. The complaint was filed in the United States District Court for the Southern District of Ohio, Western Division, on April 26, 1991, naming as defendant Lee Fisher, Attorney General

of Ohio. (Doc. No. 1.[1]) The District Court had subject-matter jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3).

The First Amended Complaint, filed on May 13, 1991, which added as defendants J. Anthony Sawyer, Dayton City Attorney, and Lee J. Falke, Montgomery County Prosecuting Attorney, (Doc. No. 11), alleged that five facial defects rendered the entire statute unconstitutional, and that seven other specific provisions of the statute were also facially unconstitutional.[2]

On August 2, 1993, the District Court rendered its decision on Plaintiffs' motion for preliminary injunction and Defendants' cross-motions to dismiss under Fed. R.

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[1] The District Court record is cited by document number (Doc. No.) in the docket.

[2] The five systemic flaws were: (1) unconstitutional discrimination against the small and unpopular charities who use professional fundraisers; (2) unconstitutional exemption for religious speech; (3) impermissible discretionary licensing of speech; (4) lack of required procedural safeguards; and (5) excessive vagueness and lack of scienter requirements in imposing penalties. The seven issue-specific flaws were: (1) imposing State-created "contractual" terms other than those the charity and fundraiser agreed to; (2) requiring that a charity control the bank account of a fundraising campaign even when it is an unwarranted burden on the charity and an undue risk to the fundraiser; (3) mandating that certain oral statements be made by fundraisers and the time they must be made; (4) exacting certain fees and bonds from the charity and the fundraiser; (5) prohibiting fundraisers from employing people who had in the past engaged in certain wrongful acts; (6) prohibiting fundraisers from participating in certain solicitations regarding missing children; and (7) imposing regulations on charitable campaigns that involve the distribution of tickets.

Civ. P. 12(b)(1), (6). The court granted a preliminary injunction as to four provisions of the statute – two of the registration criteria and the provisions regarding missing-children solicitations and ticket distribution – and otherwise denied the requested injunction. It denied the rule 12(b)(1) motion to dismiss, granted the rule 12(b)(6) motion as to four of the statutory provisions, and denied it as to seven other grounds.

The Plaintiffs and the Attorney General cross-appealed. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1292(a)(1), and affirmed as to both appeals.

B. Statement of facts.

The Plaintiffs, Petitioners here, are two charitable organizations, the Dayton Area Visually Impaired Persons, Inc. (DAVIP), and the Wayne County Foster Parents Network, and the Ohio Telemarketing Association, Inc. (O.T.A.), an organization of companies that engage in charitable fundraising in Ohio. The O.T.A. sued on behalf of its members and their charitable clients.

DAVIP is an Ohio non-profit corporation whose purpose is to educate, benefit, and offer support and information to visually impaired persons. The Wayne County Network is an unincorporated association that, when the action was filed, had recently been founded. It proposed to train prospective foster parents, to advocate for foster children, to provide a support system for foster families, and to promote the development of foster children. (Doc. No. 11 ¶¶ 4-5.)

The new statute jeopardized DAVIP's fundraising plans. DAVIP did not have the expertise to handle the statute's requirements, did not want the responsibility the statute thrusts on it of managing the campaigns' financial affairs, and was compelled to give up contracts that it wants to use. (Doc. No. 11 ¶ 14.)

The Wayne County Network had, up to the time of filing, relied on contributions from members and friends, but so little was raised that its activities were limited. Like DAVIP, the Network had no trained fundraiser members, and it could not count on its members' own time and energy that would be needed for successful fundraising. (Doc. No. 11 ¶¶ 15, 17.) The Network decided to engage an O.T.A. member, but the statute effectively prevented the Network from hiring a fundraiser and therefore from realizing its goals. (Doc. No. 11 ¶¶ 19-21.)

The O.T.A.'s members conduct campaigns for small charities throughout the state that, like DAVIP and the Network, cannot handle fundraising on their own. In 1990, members of the O.T.A. conducted campaigns for more than 100 such organizations. These campaigns generally disseminate information about the organizations, and often encourage new membership.

Many of the organizations represented by O.T.A. members are small, not well funded, relatively unknown to the public, or unaffiliated with larger, established groups or centralized fundraising organizations, and in some cases represent unpopular causes. The organizations usually do not have and cannot afford their own fundraising and information staff. They therefore must

use professional companies to get their message out and to raise funds. (Doc. No. 11 ¶¶ 22-24.) The statute burdened and chilled the speech of both the O.T.A.'s potential clients and its members as "professional solicitors." (*See* Doc. No. 11 ¶¶ 22-32.)

C. The Statute.

1. How the statute selectively regulates.

The statute, Ohio Rev. Code ch. 1716 (Appendix C) [hereinafter cited by section], operates on, among other things, "charitable organizations," and "professional solicitors." It does so selectively.

The statute first defines "charitable organization." Excluded from that definition are employers and their paid employees who "incidentally" solicit contributions. § 1716.01(A)(2) [para. 3]. "Incidentally" is not otherwise defined.

Next, the statute exempts five categories of the remaining charitable organization, § 1716.03, including all "religious agencies and organizations, and charities, agencies, and organizations operated, supervised or controlled by a religious organization," as well as I.R.C. § 501(c)(3) organizations that have existed in Ohio for two years and register as "charitable trusts" under another statute,[3] § 1716.03(B).

There is also the matter of "professional solicitors." This term is initially broadly defined. *See* § 1716.01(I).

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[3] Ohio Rev. Code §§ 109.23-.33.

Defined out of the "professional solicitor" category, however, are several important categories. *See* § 1716.01(I)(1)-(4).

Exemption (2)(a) covers the charity and its officers, employees, and volunteers. Exemption (2)(b) fits the United Way and other "umbrella" groups. Exemption (3) parallels the exclusion from the definition of a charity of "incidental" work by businesses. Under exemption (4), companies whose primary purpose is not charitable fundraising may hire any number of employees whose sole function is charitable fundraising and remain exempt.

None of the exemptions from the definition of professional solicitor depends on the amount of money solicited or the amount spent on costs for doing so. What remain covered by the statute are "outside" professional fundraisers.

2. What happens to the regulated groups.

The statute heavily regulates those charities outside the exemptions. These regulations come in several groupings.

First, the charities themselves are subject to an annual registration procedure. § 1716.02. Charities may not solicit until they register. § 1716.02(A). Information, § 1716.02(B), and documentation, § 1716.02(C) must be provided. A fee of up to $200 must be paid. § 1716.02(D). The charities must also prepare and file an annual financial report. § 1716.04. The report has four parts, and involves various accounting rubrics. *See* § 1716.04(A).

Professional solicitors are subject to a separate range of requirements, all of which must be met before they may solicit. § 1716.07. The solicitor must register every year. § 1716.07(B). The solicitor must pay a $200 fee. *Id.* She must post a $25,000 bond. § 1716.07(C). Before beginning a campaign, she must file a "solicitation notice," which includes data and documentation. § 1716.07(D). Within ninety days after the campaign, she must file a financial report. § 1716.07(E). The solicitor must maintain for three years eight categories of documents, § 1716.07(G)(1)(a)-(h), and "[a]ny other record of such information as the attorney general may require," § 1716.07(G)(1)(i). Any of these records must be provided on request to the Attorney General. § 1716.07(G)(3). The solicitor must report any change in any information to the attorney general within seven days. § 1716.07(H). If the solicitor sells tickets to an event, additional records must be kept, *see* § 1716.07(G)(2), and made available at the Attorney General's request, *see* § 1716.07(G)(3).

All funds the solicitor may collect must be deposited in a bank account subject to the charity's sole control, whether or not the charity wants to do this. § 1716.07(F). The solicitor may not be and may not hire anyone who has been convicted of certain offenses within five years. § 1716.07(I).

Contracts between charities and professional solicitors must also meet certain regulations. Each contract "shall contain the percentage of the gross revenue from the solicitation campaign that the charitable organization will receive." § 1716.08(A). Again without regard to the wishes of the parties, if the solicitor's compensation is

contingent, this "stated percentage" must be "fixed." § 1716.08(A)(1). If the compensation is fixed, the "stated percentage" must be an estimate based on "all the relevant facts." *See* § 1716.08(A)(2)(2)(a). The final payout must be at least 90% of that estimate. § 1716.08(2)(b).

The solicitor must "disclose[ ] at the point of solicitation" data about both herself and her status, and the name and address of all organizations who may use any money collected. § 1716.08(B)(1). On request, she must also give the percentages previously established by the statute. § 1716.08(B)(2).

Written, signed consents must be obtained from any organization the solicitor says will receive funds. § 1716.08(C). If she represents that tickets will be donated to others, another set of rules is triggered. § 1716.08(D).

The statute authorizes a range of penalties. The Attorney General can obtain injunctions, fines of up to $10,000 for each violation, restitution, attorney's fees, and "costs of investigation and litigation." § 1716.16(B), (D). Any violation of any provision of the statute or any rule under it is also a crime, § 1716.99(A), with each occurrence a "separate offense," § 1716.99(B). A second or further conviction is a felony. § 1716.99(A). Upon a finding of violation, there are mandatory penalties of bond forfeiture and a five-year ban on solicitation. § 1716.99(C).

REASONS FOR GRANTING THE WRIT

I. Introduction.

This Court has never upheld a complex regulatory scheme for charitable solicitations. Rather, First Amendment principles have triggered intensive judicial review and confined States to their fraud statutes and narrowly tailored regulations.

In particular, a State may not provide other than a level playing field for competition for charitable donations. Certiorari should be granted here to solidify that principle, since the decision below approves significant deviations from it.

In four cases over the last fifteen years, the Court struck down enactments regulating charitable solicitations. *Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988); *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947 (1984); *Larson v. Valente*, 456 U.S. 228 (1982); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980). In *Munson*, Maryland's statute had been passed to fit through a perceived loophole in *Schaumburg*, and, in turn, in *Riley*, North Carolina had sought to design a law that would satisfy *Munson*. Neither effort succeeded.

This case presents the post-*Riley* generation of laws. The Ohio statute at issue here is not a singular event. According to the State, it "was based upon the Charitable Solicitation Model Act created by the National Association of Attorneys General," whose drafters "explicitly took account of recent decisions by the United States

Supreme Court." (6th Cir. Brief of Appellee and Cross-Appellant at 9.)

The adjudication of the constitutionality of the Ohio statute is therefore bound to have nationwide impact.[4] The lax review engaged in by the court below is, however, in sharp conflict with *Riley*'s axioms that charitable solicitation, whether conducted directly by the charity or on its behalf by a professional fundraiser, is "fully protected expression," government regulation of which "must be measured in minimums, not maximums." 487 U.S. at 797, 790. Intervention by this Court would ensure that application of the wrong constitutional standards

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[4] The Sixth Circuit noted that among the statute's "operative distinctions" are those "between new and established organizations" and "between religious and non-religious organizations." (App. 13.) Many States exempt in-house professional fundraisers from regulation as professional fundraisers. *See, e.g.*, Alaska Stat. § 45.68.900(4)(B); Ga. Code Ann. § 43-17-2(2); Me. Rev. Stat. Ann. tit. 9, § 5003(10); Md Bus. Reg. Code Ann. § 6-101(e)(2)(ii); Mass. Gen. Laws Ann. ch. 68, § 18; Mich. Comp. Laws Ann. § 400.272(2)(g); Miss. Code Ann. § 79-11-501(d); Mo. Ann. Stat. § 407.453(4); R.I. Gen. Laws § 5-53-1(i); Wash. Rev. Code. Ann. § 19.09.020(8)(b).

It is also common for States to exempt religious organizations from solicitation regulations. *See, e.g.*, Alaska Stat. § 45.68.120; Ga. Code Ann. § 43-17-2(10); Me. Rev. Stat. Ann. tit. 9, § 5003(1); Md. Bus. Reg. Code Ann. § 6-102(c)(2)(A); Mass. Gen. Laws Ann. ch. 68, § 35; Mich. Comp. Laws Ann. § 400.272(2)(a); Miss. Code Ann. § 79-11-505; Mo. Ann. Stat. § 407.456(2)(1); R.I. Gen. Laws § 5-53-1(a); Wash. Rev. Code. Ann. § 19.09.020(2).

will not, borne on the provisions of the model law, propagate throughout the country.[5]

Examination of the statute proves it to be rife with precisely the kind of conceptions so often condemned by this Court when it comes to laws regarding speech – paternalism, favoritism, and overregulation. The statute sets up high hurdles for some solicitations for charitable causes, while granting others a freer run.

Effectively exempting from its scope favored organizations like large and established charities – the groups that raise the most money and engage the most staff – the statute focuses on the small, unaffiliated, and unpopular groups that must rely for their support on outside professional fundraisers. Organizations with in-house fundraising staff, no matter how expensive, are barely touched by the law. Those without it are faced with its full brunt.

The Ohio law also openly favors religion over nonreligion. It specifically exempts from registration and disclosure – and apparently even from professional-fundraiser regulation – not only religious organizations but all "charities, agencies, and organizations operated, supervised, or controlled by religious organizations," regardless of whether the latter have a specific religious

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[5] The present writ is sought from the affirmance of a denial of a preliminary injunction. As the District Court recognized, however, the Petitioners asserted that the Ohio statute was *facially* unconstitutional as to the points in question. (*See* App. 46.) The petition thus presents issues of law ripe and fully appropriate for the exercise of certiorari jurisdiction. *Cf., e.g., Doran v. Salem Inn, Inc.*, 422 U.S. 922, 927 (1975) (granting certiorari from affirmance of preliminary injunction).

purpose. To excuse this range of organizations from regulation on the basis of mere religious affiliation exceeds any acceptable Free Exercise-based accommodation.

Again like the States in the prior cases, Ohio here has lighted upon what it believes to be gaps in this Court's opinions, seeking narrowly to distinguish *Riley* and to expand certain dicta in it on the question of compelled speech. As occurred in *Munson* and *Riley*, however, the route chosen by the State is cut off by the principles on which *Riley* rests.

II. Whether the Imposition of Onerous Burdens on Charities That Engage Outside Professional Fundraisers Unconstitutionally Discriminates Against Small and Unpopular Charities is an Important Issue That Should be Settled By This Court.

The statute imposes heavy burdens on outside professional fundraisers for charities, while exempting in-house fundraising staff, including professional staff. *Riley* recognized that a burden placed on an outside professional fundraiser "necessarily discriminates against small or unpopular charities, which must usually rely on professional fundraisers." 487 U.S. at 799. It reserved the question of whether "differential treatment of professional and nonprofessional fundraisers" is lawful. *Id.* at 802 n.14. Here, the exemption from regulation extends not only to nonprofessional, but also to *professional* staff fundraisers. *See generally* Bruce R. Hopkins, *The Law of Fund-Raising* § 5.5, at 344 (1991) (noting that the discrimination issue is unsettled).

The court below deemed Ohio's classification subject only to deferential review and held it valid. (App. 12-14.) The issue posed by this case arises in the statutes of many States. *See, e.g., State v. Smoky Mountain Secrets*, 1995 WL 25678, at *3-*6 (Tenn. Ct. App. May 3, 1995) (invalidating analogous provisions of Tennessee statute), *permission to appeal granted*, No. 02S01-9509-CH-00084 (Tenn. Sept. 25, 1995).

The disparity in regulation gives established charities a competitive advantage over newer or smaller groups over and above that which they already enjoyed. This result does not appear to be fortuitous. For example, the Assistant Attorney General principally responsible for framing the statute noted that the statute's "passage would not have been possible without the help of Ohio's charitable community, particularly Ohio United Way, who reviewed the Bill following its introduction and provided their comments and concerns which were incorporated into the substitute Bill." Anthony J. Celebrezze, Jr. & William Scott Lavelle, *House Bill 486 Summary* at [1] (n.d.) (Doc. No. 5, Exhibit B).

The audience for charitable speech and the universe of potential donors are finite. In charitable fundraising, as in other areas, "competition . . . improve[s] performance." Richard Steinberg, *Economic Aspects of Regulating Charitable Solicitation* 33, *in* N.Y.U. Law School Program on Philanthropy and the Law, *Charitable Solicitation: Is There a Problem?* (1990). The impact of Ohio's regulation is far from random. The District Court, consistent with the Court's statement in *Riley*, recognized that "the statute[ ] focus[es] on smaller, less established charities. . . . " (App.

83-84.)[6] The Ohio law imposes heavy burdens and expenses on one group of charities, having no relationship to their program activities. With the winds of competition diminished, established charities are allowed to flourish in a State-protected hothouse regardless of whether their activities merit that level of support, while State action chills non-mainstream organizations.[7]

The use of outside professional fundraisers is no more likely to lead to fraudulent activity than is the use of in-house fundraisers. To the contrary, consistent with the view embedded in *Riley*, *see* 487 U.S. at 798-99 & 799 n.10, outside "professional fundraisers provide a much needed and useful service assisting charitable organizations in obtaining the dollars needed to provide important and vital services. . . . " Athornia Steele, *Regulation of Charitable Solicitation: A Review and Proposal*, 13 J. Legis.

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[6] The Court of Appeals labeled as "mistaken" the contention that "small charities are necessarily singled out by O.R.C. § 1716 for different treatment than that received by larger charities." (App. 13.) In doing so, it focused on the sub-$25,000 exemption, § 1716.03(E), but ignored the entire scheme of professional-solicitor regulation, which creates just that effect.

[7] The burdens imposed only on outside professional fundraisers include their own constitutional difficulties. For example, the statute mandates certain contractual terms, § 1716.08(A); it requires that the outside professional solicitor abjure any control over funds collected, § 1716.07(F); it incapacitates a person from serving as or working for an outside professional solicitor as a result of certain past convictions, § 1716.07(I). The statute also prohibits solicitation by outside professional fundraisers, § 1716.07(A), (B), (D), and by non-exempt charities, § 1716.02(A), (B), until registrations and notices with arguably indefinite terms have been filed.

149, 152 (1986). "[I]f an organization indulges in fraud, there is nothing in the prohibition of paid solicitors that prevent it from misdirecting funds." *Munson*, 467 U.S. at 967. Recent cases arising under the aegis of large-scale charities – like United Way[8] or PTL[9] – are illustrative.

Both the Free Speech and Equal Protection Clauses protect the essential principle of the equality of ideas. They disable the State in many contexts from gerrymandering the expressive sphere in ways that favor some ideas or some speakers over others.

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,' " and " 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' ". . . . The First Amendment's protection against governmental abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.

Buckley v. Valeo, 424 U.S. 1, 48-49 (1976). In *Meyer v. Grant*, 486 U.S. 414 (1988), it was not "permissible to mute the

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[8] *See* Sharon Walsh, *Parkinson's Association Director Accused of Embezzling $800,000*, Wash. Post, Oct. 31, 1995, at D1 (referring to United Way, Foundation for New Era Philanthropy, and American Parkinson's Disease Association).

[9] *See United States v. Bakker*, 925 F.2d 728 (4th Cir. 1991).

voices of those who can afford to pay petition circulators." *Id.* at 426 n.7. *See also, e.g., Turner Broadcasting Sys. v. FCC*, 114 S. Ct. 2445, 2467 (1994) (noting that *Buckley* "stands for the proposition that laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference.").

Here, the statutory scheme dampens the voices of non-mainstream charities in favor of those of their more conventional counterparts, and, in the process, skews the content of the messages received by the public. Strict scrutiny should apply in these circumstances.

The court below concluded that the statutory scheme should be measured only under the rational basis test, because the legislative classification between "new and established charities" was not one that " 'impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class.' " (App. 12-13) (quoting *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976).)

The court thus proceeded under an equal protection rubric, eschewing First Amendment analysis. Moreover, it ignored the Ohio statute's regulation of professional fundraisers. Without considering this critical element, the court asserted that "the plaintiffs were unable to establish" any "interference with the fundamental right to free speech." (App. 13.) It is clear, however, that the exercise of a fundamental right is involved.

The court also concluded that the statutory classification would withstand even strict scrutiny because "[t]he difference in the treatment between the two groups set up

by the statute is narrowly tailored to accomplish the compelling governmental interest in preventing fraudulent solicitations of the very individuals most disposed to contribute financial support in response to pleas for donations." (App. 13-14.)

In purporting to apply strict scrutiny, the court erred in two ways. First, even at best, its test resembles only the intermediate scrutiny that applies to content-neutral, time, place, and manner regulations. *See Ward v. Rock Against Racism*, 491 U.S. 781, 798-800 (1989). *Ward* reaffirmed that "exacting scrutiny" is to be applied to content-based laws, but noted that, "[w]hile time, place, or manner regulations must also be 'narrowly tailored' in order to survive First Amendment challenge, we have never applied strict scrutiny in this context." *Id.* at 798 n.6. Here, the court below did not apply exacting scrutiny, nor did it consider less-restrictive alternatives like the enforcement of penal laws, *see, e.g., McIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511, 1522 (1995); *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940).

Nor did the court below correctly apply even the more moderate version of narrow tailoring. The court's conclusion rests on the view that the statute will "help ensure that citizens of the state are protected from fraudulent schemes." (App. 14.) To say merely that a chosen means will "help" achieve a given end is the antithesis of narrow tailoring. Even under this weak standard the court's reasons are insubstantially, at best, related to fraud. The question of fraud in relation to a charity's "establish[ing] a track record as a legitimate organization," (App. 14), is "purely conjectural." *Cf. Larson*, 456 U.S. at 249 n.24 (assumption that charity is supervised by

its members when the members contribute more than half its solicited income). The State made no showing to this effect, and as noted above, charities with lengthy "track records" are hardly immune from fraudulent activities.

III. The Statute's Religious Exemption Raises Important Issues as to (1) the Permissible Scope of Official "Accommodation" of Religion, and (2) the Degree of Scrutiny Applied to the Favoring of Religious Over Non-Religious Speech.

The statute exempts from coverage "[a]ny religious agencies and organizations, and charities, agencies, and organizations operated, supervised, or controlled by a religious organization." § 1716.03(A). This exemption, and thus the statute as a whole, is invalid.

A. Establishment Clause.

The Ohio statute differentially burdens nonreligious and nonreligious-affiliated organizations without warrant in Religion-Clauses values, giving religion-affiliated groups a significant competitive advantage in the larger marketplace of ideas. The case raises important questions as to the scope of permissible accommodation after *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), and *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987).

The Court recently explicitly invited comparison of the two cases, noting that "*whatever the limits* of permissible accommodation may be . . . , it is clear that neutrality as among religions must be honored." *Board of*

Educ. v. Grumet, 114 S. Ct. 2481, 2493 (1994) (emphasis added). Commentators have observed that *Texas Monthly* and *Amos* "reveal substantial uncertainty" regarding the scope of permissible accommodation. Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. Pa. L. Rev. 555, 564 (1991); *accord*, Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing The Limits of Legislative Power*, 73 Tex. L. Rev. 247, 289 (1994).

In *Texas Monthly*, the Court struck down on Establishment Clause grounds a Texas sales tax that exempted religious periodicals. The plurality opinion noted that the Establishment Clause forbids the government from "direct[ing] a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion. . . . " 489 U.S. at 15.

There is no principled difference between a *subsidy* exclusively *for* religious organizations and a *burden* exclusively *on* secular organizations. Moreover, the Free Exercise Clause does not mandate that churches be exempt from license or registration requirements. *See Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940) (general regulations of solicitation in ways that are not otherwise unconstitutional and do not involve a "religious test" do not violate the Free Exercise Clause).

The religious exemption, § 1716.03(A), is the only exemption in the Ohio scheme that is absolute and unqualified. Each of the others, § 1716.03(B)-(E), contain

conditions or requirements that are purportedly related to the purpose of the regulation. *See Texas Monthly*, 489 U.S. at 14 n.4 (plurality opinion) (existence of "other sales tax exemptions . . . for *different* purposes does not rescue the exemption for religious periodicals from invalidation") (emphasis in the original). The religious exemption alone is linked to no functional characteristic, but is defined entirely by the affiliation of the organization.

Moreover, it applies not only to "religious agencies and organizations," but to all "charities, agencies and organizations operated, supervised, or controlled by a religious organization" even if they are not themselves religious. Thus, the exemption sweeps within its ambit charities indistinguishable from other charities – be they hospitals, burial societies, educational institutions, publishers, or what-have-you – simply because they are organizationally affiliated with religious entities. No Free Exercise Clause principle commends that result.

Although, in response to Plaintiffs' point about *Texas Monthly*, the District Court had recognized that, "[a]s a doctrinal matter, such an assertion may have validity," (App. 86 n.33), the Court of Appeals made no mention of *Texas Monthly*. It relied, instead, entirely on the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), as applied in *Amos* – which upheld Title VII's exemption for religious organizations – to uphold the statute, which the court nevertheless regarded as relatively "problematic," (App. 14). Two points are notable.

First, in *Amos*, for the Government, through Title VII, to have intervened in the decisions of churches to hire

personnel would certainly have been a "significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Amos*, 483 U.S. at 335. As the plurality in *Texas Monthly* explained, the accommodation represented by the Title VII provision was permissible because it "prevented potentially serious encroachments on protected religious freedoms." 489 U.S. at 18 n.8.

The exemption here, "by contrast, does not remove a demonstrated and possibly grave imposition on religious activity sheltered by the Free Exercise Clause." *Id.* The State never demonstrated any justification of this kind. Unlike *Amos*, this statute does not lift a burden affecting a church's internal operations. Instead, like *Texas Monthly*, the statute involves only organizations' relations with the public beyond church walls. The burdens that would be suffered by religious organizations under the statute here are not distinctive to their religious nature. It is not without irony, moreover, that the Court of Appeals held the religious exemption valid because it " 'lift[s] a regulation that burdens the exercise of religion,' " (App. 16 (quoting *Amos*, 483 U.S. at 338)), when it earlier had dismissed the discrimination challenge with the assertion that the statutory requirements were "relatively innocuous," (App. 14).

Second, like the statute in *Texas Monthly*, but unlike that in *Amos*, the Ohio exemption "impose[s] substantial burdens on nonbeneficiaries." *Texas Monthly*, 489 U.S. at

18 n.8. As discussed above, the nonexempt charities are placed at a considerable competitive disadvantage.[10]

The Sixth Circuit also asserted that "the religious exemption itself actually helps ensure that the government will not become unnecessarily *entangled* in religious affairs." (App. 16 (emphasis in the original).) The reason is unpersuasive, since "routine regulatory interaction" does not violate the nonentanglement principle. *Hernandez v. Commissioner*, 490 U.S. 680, 696-97 (1989).

B. Free Speech and Equal Protection.

Petitioners contend that the exclusion of religious solicitation violates the Free Speech and Equal Protection Clauses as well, because the provision is an invalid governmental discrimination distributing benefits and burdens based on the content of speech.

The sole answer of the court below was to quote *Amos* for the proposition that if a statute "passes the *Lemon* test," under equal protection principles, "[t]he proper inquiry is whether Congress has chosen a rational classification to further a legitimate end." *Amos*, 483 U.S. at 339, *quoted in* App. 17. But *Amos* was not a speech case, and this Court has never held that a statute that makes content-based distinctions in speech is somehow immune from strict scrutiny because it satisfies *Lemon*.

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[10] Moreover, even though the Court of Appeals purported to apply the *Lemon* test, it failed to address the salient point under prong 1 of *Lemon* – whether the *exemption* (not the statutory scheme as a whole) has an appropriate secular purpose.

"[N]onreligious organizations seeking support for their activities are entitled to rights equal to those of religious groups to enter a public forum and spread their views, whether by soliciting funds or by distributing literature." *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 653 (1981). In the realm of speech, religious exemptions are thus particularly suspect.

The Sixth Circuit's approach is also inconsistent with *Rosenberger v. Rector & Visitors of the University of Virginia*, 115 S. Ct. 2510 (1995). *Rosenberger* applied the most stringent scrutiny to hold the University's student activities funding guideline that excluded "religious activities" from official financial support an invalid content discrimination of speech, *id.* at 2516-20, even though to permit the funding did not violate the Establishment Clause, *id.* at 2520-25.

IV. Certiorari is Warranted to Resolve *Riley*'s Dicta as to the Recurrent Issue of "Point-of-Solicitation Disclosures."

"Point-of-solicitation disclosures" are a common feature of charitable solicitation statutes. *Riley* held such a requirement to be content-based compelled speech "subject to exacting First Amendment scrutiny" and invalidated it. 487 U.S. at 798-801. In dictum, however, the Court indicated that certain mandatory disclosures "would withstand First Amendment scrutiny." *Id.* at 799 n.11. The decision here, (App. 22-23), misinterprets *Riley* and incorrectly expands that dictum, and is not alone in that regard. *See also, e.g., Famine Relief Fund v. West Va.*, 905 F.2d 747, 751-52 (4th Cir. 1990).

The Ohio statute provides for several levels of such disclosures, which are applicable only to covered professional solicitors. § 1716.08(B). They do not meet *Riley*'s exacting scrutiny for such content-based, paternalistic regulations.

The first set of disclosures applies "[p]rior to verbally requesting a contribution." § 1716.08(B)(1). These include "[t]he name of the professional solicitor as it is on file with the attorney general and a statement that the solicitation is being conducted by the person as a professional solicitor," § 1716.08(B)(1)(a), and "[t]he name and address of each charitable organization on behalf of which all or any part of the contributions collected will be used," and, if the charity is not an I.R.C. § 501(c)(3) organization, "the particular charitable purpose or purposes to be advanced with the funds raised," § 1716.08(B)(1)(b). Two issues are raised: *what* speech the state can compel and *when* it can compel it to be made.

Although the dictum in footnote 11 of *Riley* approved a disclosure something like that required by § 1716.08(B)(1)(a), *see* 487 U.S. at 799 n.11; *but see id.* at 803-04 (Scalia, J., concurring in part) (rejecting footnote 11), the dictum did not extend to a disclosure required to be made *before* a solicitation. As intrusive as it is to require certain speech, it is even more intrusive to require that it be said at a particular time or in a particular order. Nothing in footnote 11 is to the contrary.

The courts below noted that footnote 11 was not a holding of the Court, (App. 23, 61 n.17), and the District Court recognized the concern that "the logic of the footnote 'is contrary to the [Supreme] Court's own reasoning

in *Riley*,' " (App. 62 n.18) (brackets in the original) (quoting Leslie G. Espinoza, *Straining the Quality of Mercy: Abandoning the Quest for Informed Charitable Giving*, 64 S. Cal. L. Rev. 605, 627 (1991)). There is strong reason, if not to reject footnote 11, at least to confine it closely.

Less-restrictive alternatives here are easily found. Even if the speech can be required, it does not need to be the first sentence to be spoken but can be required to be made, for example, before a pledge is obtained or a contribution is made.

The same result applies to § 1716.08(B)(1)(b), but that provision has additional infirmities. By including the "address" of the charitable organization as an element of what must be stated, the statute imposes an awkward and unnecessary impediment to charity's speech. Few people will want to hear about a charity if they first have to listen to a litany of street names, post office boxes, office numbers, and ZIP codes. Moreover, the provision apparently requires the solicitor to determine, in advance and at her peril, all the charities that may use raised funds. This may be impossible to do.

The most critical moments of a telephone contact are its opening few seconds. It is here, above all, that the speaker must be permitted to define her own message. The State's attempt to occupy that time with its own bureaucratic minutiae has the effect, if not the intent, of *blocking* communication.

Finally, there is no magical difference between 501(c)(3) and non-501(c)(3) organizations. There may be many reasons why a group does not seek or obtain a 501(c)(3) designation. *See Telco Communications, Inc. v.*

Barry, 731 F. Supp. 670, 681 (D.N.J. 1990) (statute requiring disclosure of non-tax-exempt status and of deductible percentage of purchase price was invalid because it "risk[ed] favoring tax-exempt over non-tax-exempt charities and discouraging professional fundraisers from soliciting on behalf of the latter.").

Section 1716.08(B)(2) next imposes a duty to speak in a certain way and suffers from at least two fundamental flaws. The disclosure requirement itself violates the First Amendment. Moreover, the information required to be disclosed itself derives from inadmissible assumptions.

Riley held unconstitutional a "point of solicitation disclosure" requirement indistinguishable from Ohio's except that it was required *initially* to be made, rather than made upon request. The North Carolina law had a similar provision, but it "was not challenged in *Riley* and thus was not before the Court." *Famine Relief Fund*, 905 F.2d at 752. The same reasons that fatally undermined the challenged law in *Riley* are, however, also present here. The difference is at best one of degree, not principle.

Riley pointed out that "if the potential donor is unhappy with the disclosed percentage, the fundraiser will not likely be given a chance to explain the figure: the disclosure will be the last words spoken as the donor . . . hangs up the phone." *Id.* (footnote omitted). Section 1716.08(B)(2) engenders the same effects, and the less restrictive alternatives mentioned in *Riley* are equally apt here.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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Nos. 93-3977/3979

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DAYTON AREA VISUALLY IMPAIRD PERSONS, INC., an Ohio non-profit corporation; WAYNE COUNTY FOSTER PARENTS NETWORK, an unincorporated Ohio non-profit association; OHIO TELEMARKETING ASSOCIATION, INC., an Ohio non-profit corporation,	)	ON APPEAL from the United States District Court for the Southern District of Ohio
Plaintiffs-Appellants/ Cross-Appellees,	)	
v.	)	
LEE FISHER, Attorney General, State of Ohio,	)	
Defendant-Appellee/ Cross-Appellant,	)	
J. ANTHONY SAWYER, City Attorney of the City of Dayton, Ohio; LEE J. FALKE, Prosecuting Attorney, Montgomery County, Ohio,	)	
Defendants-Appellees.	)	

Decided and Filed November 16, 1995

Before: ENGEL, NORRIS, and DAUGHTREY, Circuit Judges.

DAUGHTREY, J., delivered the opinion of the court, in which ENGEL, J., joined. NORRIS, J. (p. 31), delivered a separate opinion concurring in part and dissenting in part.

MARTHA CRAIG DAUGHTREY, Circuit Judge. This interlocutory appeal stems from the district court's order both granting and denying injunctive relief in response to First Amendment and equal protection challenges to Ohio's recently enacted charitable solicitation statutes. The suit, seeking declaratory and injunctive relief, was brought by three plaintiffs, Dayton Area Visually Impaired Persons, Inc. ("DAVIP"), the Wayne County Foster Parents Network, and the Ohio Telemarketing Association, against the defendants, principally Lee Fisher, then the Ohio Attorney General.

In their complaint, the plaintiffs alleged that selected portions of the Ohio Charitable Solicitation Act violate the First and Fourteenth Amendments' guarantees of free speech and non-establishment of religion. The district court agreed with the plaintiffs that four discrete portions of the statutes relating to charitable fundraising were unconstitutional and should not be enforced. In all other respects, the district court refused to issue a preliminary injunction that would effectively invalidate the statutes' provisions. Both the plaintiffs and the defendants appeal

to this court from those portions of the district court order decided adversely to their positions. For the reasons detailed in this opinion, we affirm the judgment of the district court.

FACTUAL AND PROCEDURAL BACKGROUND

The Statute

In 1990, the Ohio General Assembly passed a comprehensive revision of the Ohio's charitable solicitation law, codified as Chapter 1716 of the Ohio Revised Code and as § 2901.32 of the Code, in an effort to curtail fraudulent activities in the solicitation of charitable donations. Pursuant to the act, all non-exempt charitable organizations in the state intending to solicit contributions must file with the attorney general a registration form containing, among other things, the names, addresses, and phone numbers of directors and officers, financial information from the prior fiscal year, and "[a]ny other information that the attorney general may, *by rule*, require." O.R.C. § 1716.02(B) (emphasis added). Furthermore, those entities required by the act to register with the state must also provide annual financial reports on forms prescribed by the Attorney General, O.R.C. § 1716.04, and must pay a registration fee between $50 and $200, according to a set scale, if the charitable organization received at least $5000 in contributions in the last fiscal or calendar year. O.R.C. § 1716.02(D)(1). Exempt from the registration requirements, however, are various educational and charitable organizations meeting certain stated criteria and "any religious agencies and organizations." O.R.C. § 1716.03.

Professional solicitors are prohibited by O.R.C. § 1716.07 from engaging in any solicitation in the state until they have registered with the Attorney General, submitted a required $200 fee, and obtained a surety bond in the amount of $25,000. Moreover, such solicitors are required to provide certain general and financial information on an application, as well as "any other information that the attorney general may require," and must submit "a full and fair description of the charitable program for which the solicitation campaign is being carried out." The same section of the statute also contains certain record-keeping requirements and prohibits service as a professional solicitor by anyone who has been convicted within the five previous years of any felony or of a prior violation of the Charitable Solicitations Act. Professional solicitors are further required by the provisions of O.R.C. § 1716.07(F) to collect contributions solely in the name of the charitable organization on whose behalf the contribution was solicited and, within two days of receiving the donation, to deposit the entire amount of the contribution into a bank account under the sole control of the charitable organization.

Pursuant to O.R.C. § 1716.08, the act imposes a duty on professional solicitors to include certain provisions in their contracts with charitable organizations. Specifically, such contracts must specify the percentage of gross revenue from a solicitation campaign that a charity will receive and the percentage of gross revenue that the solicitor will claim as compensation. Furthermore, at the point of solicitation, prior to requesting a contribution verbally, and at least contemporaneously with a written request for a contribution, a professional solicitor is

required by the provisions of O.R.C. § 1716.08(B) to reveal the solicitor's name, the fact that the solicitor is a professional solicitor, and the name and address of the charitable organization on whose behalf the solicitation is being conducted. If the person being solicited requests information regarding the percentage of gross revenue the charity will receive from the campaign, the solicitor must respond truthfully to that inquiry. This section of the statute also provides that a professional solicitor may not represent that tickets to an event will be donated to other individuals unless the solicitor has, prior to initiation of the solicitation campaign, received written commitments from the persons who will use the tickets and has filed those written commitments with the attorney general.

Whoever violates a provision of the statute, or any rule promulgated thereunder, is guilty of the misdemeanor of solicitation fraud. O.R.C. § 1716.99(A). A second violation of the statute or an applicable rule subjects the violator to conviction of grand solicitation fraud, a felony of the third degree. Moreover, each solicitation in violation of the provisions of O.R.C. § 1716 constitutes a separate offense of solicitation fraud. Finally, failure to abide by the requirements of the statute subjects a violator to civil penalties of up to $10,000 per violation, costs, and attorney's fees. O.R.C. § 1716.16(B).

Also at issue in this matter are the provisions of O.R.C. § 2901.32, a statute seeking to regulate the improper solicitation of contributions for the purpose of distributing information relating to missing children, which appears to have been added to the 1990 legislation as an after-thought. Pursuant to the terms of that enactment, no organization may solicit such contributions

unless it has been incorporated as a nonprofit corporation for at least two years, has been exempt from federal income taxes pursuant to § 501(a) of the Internal Revenue Code for at least two years, and "does not use fund-raising counsel, professional solicitors, commercial co-venturers, or other charitable organizations" for soliciting funds from the public. O.R.C. §§ 2901.32(A)(1)-(3).

The Parties

DAVIP is a non-profit corporation whose purpose it is to educate, benefit, and offer support and information to visually impaired individuals. Because the organization cannot afford an in-house staff to raise the funds necessary for the corporation to carry out its objectives, DAVIP has, in the past, relied upon professional solicitors to seek contributions for the work of the corporation.

The Foster Parents Network is an unincorporated association of individuals committed to providing training, advocacy, and support for foster parents and foster children. Like DAVIP, this group has, because of its limited resources and organization, decided to retain the services of a professional solicitor to assist it in its fund-raising activities.

The Ohio Telemarketing Association is a non-profit corporation whose members include professional solicitors who engage in fund-raising on behalf of charitable and non-profit organizations in Ohio. The Association brings this action on behalf of its members, who contend that their ability to represent charitable organizations is substantially diminished as a result of the statutory requirements enforced by the defendants.

The principal defendant is the Ohio Attorney General, who championed passage of the new charitable solicitation regulations in the Ohio legislature, after they had been drafted and promulgated by the National Association of Attorneys General as a "model act." Also named as defendants in the suit, but not participating significantly in this appeal, are two local officials vested with certain enforcement responsibilities by the charitable solicitation statute.

The District Court Proceedings

After the filing of the plaintiffs' complaint, the defendants moved the district court to dismiss this matter for failure to state a claim upon which relief could be granted. The district court closely examined the allegations of the plaintiffs and the applicable law and determined that the plaintiffs could prove no set of facts entitling them to relief on some of their attacks on the provisions of O.R.C. §§ 1716 and 2901.32. In its extensive order in this matter, the district court did conclude that the plaintiffs should be granted a preliminary injunction on other claims alleging infringement of First Amendment rights. In particular, the district court ruled that the plaintiffs demonstrated a substantial likelihood of success on the merits of their claims that their free speech rights were unconstitutionally restricted by the provisions of the charitable solicitation statutes that required submission of "any other [registration] information that the attorney general may require," O.R.C. § 1716.07(B), and that required submission of a "full and fair description" of the solicitation campaign, O.R.C. § 1716.07(D)(2)(f).

Furthermore, the district court concluded that the plaintiffs were likely to succeed in their attempt to establish that restrictions on speech regarding the use of donated tickets, O.R.C. § 1716.08(D), and on solicitation of funds for distribution of materials regarding missing children, O.R.C. § 2901.32, violated the First and Fourteenth Amendments to the United States Constitution.

ANALYSIS

Appealability of Issues Dismissed by District Court

As stated previously, the district court granted *in part* the defendants' motion to dismiss the claims brought by the plaintiffs. The attorney general now argues that this court is without jurisdiction to review those elements of the plaintiffs' claims that were dismissed, because that dismissal did not effectively end the litigation on the merits.

In *Carson v. American Brands, Inc.*, 450 U.S. 79, 83 (1981), the Supreme Court noted that "[t]he first Judiciary Act of 1789, 1 Stat. 73, established the general principle that only *final* decisions of the federal district courts would be reviewable on appeal." (Emphasis in original.) Thus, "[a] party generally may not take an appeal under [28 U.S.C.] § 1291 until there has been a decision by the district court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.' " *Van Cauwenberghe v. Biard*, 486 U.S. 517, 521 (1988) (quoting *Catlin v. United States*, 324 U.S. 229, 233, (1945)). In 28 U.S.C. § 1292(a)(1), however, Congress has fashioned a limited exception to the general rule. Pursuant to that statute, in pertinent part, "[i]nterlocutory

orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions" may be appealed to the courts of appeals. In order for such interlocutory orders to be appealable, however, a litigant must demonstrate that the district court's order "might have a 'serious, perhaps irreparable, consequence,' and that the order can be 'effectively challenged' only by immediate appeal." *Carson*, 450 U.S. at 84; *Sims Varner & Associates, Inc. v. Blanchard*, 794 F.2d 1123, 1126 (6th Cir.1986).

In this case, the district court's order dismissing some of the plaintiffs' claims also constituted a refusal to grant the requested injunctive relief sought by the parties. Moreover, such a denial "might have a 'serious, perhaps irreparable, consequence' " because, as recognized in *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion), "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Furthermore, the possibility of such irreparable damage necessitates immediate redress to this court. Consequently, although the partial grant of the defendants' motion to dismiss did not constitute a final resolution of all issues raised by the plaintiffs, the effective refusal to grant requested injunctive relief that could prevent irreparable harm justifies the exercise of appellate jurisdiction by this court over all aspects of the plaintiffs' appeal.

Standard of Review

This court reviews a challenge to the grant or denial of a preliminary injunction under the abuse of discretion

standard and accords great deference to the decision of the district court. *Washington v. Reno*, 35 F.3d 1093, 1098 (6th Cir.1994). The district court's determination will thus be disturbed "only if the district court 'relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard.' " *Id.* (quoting *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir.1991)).

Review of District Court's Determinations

In deciding whether to issue a preliminary injunction, a district court must consider:

> (1) the likelihood that the party seeking the preliminary injunction will succeed on the merits of the claim; (2) whether the party seeking the injunction will suffer irreparable harm without the grant of the extraordinary relief; (3) the probability that granting the injunction will cause substantial harm to others; and (4) whether the public interest is advanced by the issuance of the injunction.

Washington v. Reno, 35 F.3d at 1099. Those four considerations are, however, "factors to be balanced, not prerequisites that must be met. Accordingly, the degree of likelihood of success required may depend on the strength of the other factors." *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir.1985).

A. Likelihood of Success on the Merits

In determining whether the district court abused its discretion in granting a partial preliminary injunction to

the plaintiffs, we must first examine the likelihood that the plaintiffs could succeed on the merits of each of the claims made before the district court. Any examination of the merits of a challenge to restrictions on charitable solicitation must begin with a review of the applicable principles of law set forth in the Supreme Court's decisions in *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980); *Secretary of State of Maryland v. Joseph A. Munson Co., Inc.*, 467 U.S. 947 (1984); and *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988). In those cases, the Supreme Court affirmed that solicitations to pay or contribute money, because they are so intertwined with speech, are entitled to protection under the First Amendment. *Riley*, 487 U.S. at 787-89; *Joseph A. Munson Co.*, 467 U.S. at 959-960; *Schaumburg*, 444 U.S. at 632-33. Furthermore, that speech is not entitled to less protection simply because the speaker is compensated for the message. *Riley*, 487 U.S. at 801. Consequently, statutes attempting to restrict such speech must be narrowly tailored to achieve an important governmental interest without unnecessary infringement of First Amendment freedoms. *Id.* at 788, 108 S.Ct. at 2673.

The Supreme Court's trilogy of solicitation cases also makes clear, however, that some speech by professional fundraisers can be regulated without violating First Amendment principles. In the three decisions, for example, the Court recognized that a statute or regulation "may constitutionally require fundraisers to disclose certain financial information" or fulfill mandated registration requirements. *Id.* at 795; *Munson*, 467 U.S. at 967 n. 16; *Schaumburg*, 444 U.S. at 637-38.

Before this court, the plaintiffs now argue that the provisions of the relevant Ohio regulatory program fall short of the constitutionally mandated protections for speech involving solicitation of funds. The defendants, on the other hand, contend that the challenged statutory provisions are narrowly tailored to address the government's important interests in preventing fraud and maintaining the public confidence in the benefits of charitable giving.

1. Discrimination Against Small and Unpopular Charities

The plaintiffs first contend that the registration and reporting requirements of O.R.C. § 1716 unconstitutionally discriminate against small and unpopular charities and in favor of larger, well-established charities. Because the alleged discrimination purportedly infringes upon the fundamental right to speak freely, the plaintiffs insist that any statute recognizing distinctions between such groups must be strictly scrutinized to ensure that the legislation reflects a compelling governmental interest that is narrowly tailored to accomplish its purposes.

The district court found that the different treatment accorded large and small charities did not implicate a suspect classification or a fundamental right. Consequently, the court applied a lessened level of scrutiny to the legislation and concluded that the statutory requirements were rationally related to the government's interest in protecting its citizens from fraud.

Strict scrutiny need be applied to legislative classifications only when "the classification impermissibly

interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976). As noted by the district court in its order in this case, the distinction between large and small charities does not implicate a suspect class. In fact, the plaintiffs are mistaken in their contention that small charities are necessarily singled out by O.R.C. § 1716 for different treatment than that received by larger charities. As made clear by the provisions of O.R.C. § 1716.03(E), an organization that does not receive gross revenue, exclusive of grants or awards, in excess of $25,000 in its immediately preceding fiscal year is not subject to the registration and fee provisions of the statute. Thus, the smallest, and also presumably the least popular, of the charitable organizations are not affected by the alleged burdens of the statute. Instead, the operative distinctions drawn in the statute are between religious and non-religious organizations, between new and established organizations, and between organizations that solicit only from individuals with ties to the institution and organizations that make broader-based financial appeals.

Furthermore, the district court properly refused to evaluate this claim under a strict scrutiny standard based upon interference with the fundamental right to free speech simply because the plaintiffs were unable to establish such interference. Even if strict scrutiny were to be applied to an examination of a legislative classification between new and established charities or between charities that make targeted and general requests for donations, however, the Ohio Charitable Solicitation Act could

withstand the plaintiffs' constitutional attack. The difference in treatment between the two groups set up by the statute is narrowly tailored to accomplish the compelling governmental interest in preventing fraudulent solicitations of the very individuals most disposed to contribute financial support in response to pleas for donations.

First, the additional requirements placed upon the selected group have not been shown by the plaintiffs to be unnecessarily burdensome or likely to restrict the speech of the organization. Also, the registration and fee requirements are of a limited duration (two years), if the organization can prove its charitable nature by qualifying as a § 501(c)(3) entity for federal tax purposes. Until a charity can establish a track record as a legitimate organization able to oversee the proper transfer of funds from donors to deserving recipients, the relatively innocuous statutory requirements help ensure that citizens of the state are protected from fraudulent schemes by mandating that the requesting organizations provide vital information about their solicitations to the state attorney general.

2. *Religious Exemption*

The statutory distinction drawn between religious and non-religious organizations is, however, more problematic. The plaintiffs contend that the blanket exemption for religious organizations and charities violates the establishment clause, as well as principles of free speech and equal protection. The district court concluded, however, that the challenged statutes satisfy the three-pronged test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), for

determining whether an Establishment Clause violation has occurred. Furthermore, the district court determined that the legislative enactments did not contravene constitutional requirements regarding equal protection of the law as applied to freedom of expression.

In *Lemon*, the Supreme Court announced the now-familiar analysis for deciding whether a statute or practice violates the Establishment Clause of the First Amendment. Under the Lemon analysis, a court must inquire whether the law at issue has a secular purpose, whether the law has "a principal or primary effect" that neither advances nor inhibits religion, and whether the law avoids excessive governmental entanglement with religion. *Id.* at 612-13. If so, the law does not contravene the prohibitions of the Establishment Clause.

Without question, the purpose of the Ohio charitable solicitation statute is secular in nature. Even though an exemption is offered for religious organizations, the legislation is intended to benefit the citizens of the state by regulating charities that solicit funds. *See Larson v. Valente*, 456 U.S. 228, 248 (1982) ("[T]he State . . . has a significant interest in protecting its citizens from abusive practices in the solicitation of funds for charity, and . . . this interest retains importance when the solicitation is conducted by a religious organization."). "*Lemon's* 'purpose' requirement aims at preventing the relevant governmental decisionmaker . . . from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 335 (1987). No such intent is present in this case.

A challenged statute, in order not to violate the Establishment Clause, also must have a primary effect that neither advances nor inhibits religion. As noted in *Corporation of Presiding Bishop*, however, "[a] law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon*, it must be fair to say the *government itself* has advanced religion through its own activities and influence." *Id.* at 337 (emphasis in original). The statute at issue in this litigation does not evidence governmental advancement of religion merely because special consideration is given to religious groups. *Id.* at 338. In fact, the Supreme Court had stated that where the "government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, [there is] no reason to require that the exemption comes packaged with benefits to secular entities." *Id.* Additionally, while only religious organizations receive a blanket exemption from the statute's registration requirements, various secular groups also need not fulfill the registration and fee payment mandates. In fact, the attorney general's synopsis of the bill that became O.R.C. § 1716 estimated that "the vast majority of charitable organizations in Ohio will be exempt from the registration and annual reporting requirements imposed by the Bill."

Finally, the religious exemption itself actually helps ensure that the government will not become unnecessarily *entangled* in religious affairs. By exempting religious charities and organizations, the State of Ohio absolves itself of the responsibility to examine the financial records of religious bodies and, as noted by the

district court, "operates to distance government from knowledge of or involvement with the inner workings of religious organizations."

Once we have determined that the provisions of O.R.C. § 1716 do not violate the Establishment Clause of the First Amendment, we must then decide whether that religious exemption nevertheless fails to afford equal protection of the laws to non-religious charities. In Corporation of Presiding Bishop, the Supreme Court, in resolving an equal protection challenge to the religious exemption to Title VII's prohibition against religious discrimination in employment, held:

> In cases such as these, where a statute is neutral on its face and motivated by a permissible purpose of limiting governmental interference with the exercise of religion, we see no justification for applying strict scrutiny to a statute that passes the Lemon test. The proper inquiry is whether Congress has chosen a rational classification to further a legitimate end.

Id. at 339.

The district court concluded that the religious exemption in O.R.C. § 1716.03 was rationally related to the legitimate governmental interest in preventing fraud. The court further held that "[t]he exemption is also consistent with the legislature's judgment that established organizations are less likely to commit fraud than those which are less established." Of course, skeptics might argue that the legislature's decision in this regard fails to recognize past abuses and the potential for future abuse

in large-scale solicitation carried on in the name of religion. We live, moreover, in an age of mail-order ministers, and we have witnessed the nationwide proliferation of minor religious sects and cults. Obviously, the status of a solicitor as a "religious" charity or organization cannot guarantee with complete assurance the absence of fraudulent solicitation. Also, the religious exemption extends not only to established organizations of the type that had presumably gained the trust of the district court, but to "*any* religious agencies and organizations." (Emphasis added.)

Nevertheless, we cannot say that the district court abused its discretion in concluding that the plaintiffs were unlikely to succeed in establishing the lack of a rational basis for the Ohio legislature's blanket exemption of religious organizations from the registration requirements of the act. Moreover, the Supreme Court has specifically held that it is a legitimate governmental purpose merely to alleviate "significant governmental intererence with the ability of religious organizations to define and carry out their religious missions." *Corporation of Presiding Bishop,* 483 U.S. at 339.

3. *Standards and Procedural Safeguards*

The plaintiffs next contend that the challenged statute amounts to an improper prior restraint on speech and lacks adequate procedural safeguards. Specifically, the plaintiffs insist that the regulatory scheme places unbridled discretion in the hands of the attorney general and fails to establish appropriate time limits for reaching

a decision on the completeness of the registration materials.

In *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225-26 (1990), the Supreme Court addressed the "two evils that will not be tolerated in" prior restraint situations. First, the Court noted that any scheme that places "unbridled discretion" in the hands of government officials in deciding whether to grant or deny a permit or license will be found unconstitutional. Second, "a prior restraint that fails to place limits on the time within which the decisionmaker must issue the license is impermissible." Despite the plaintiffs' protestations to the contrary, neither of these two evils are countenanced by the district court decision in this case.

As noted by the district court, the government does not have uncontrolled authority either to grant or to deny a license or permit. The regulatory scheme imposed by O.R.C. § 1716 does not even envision the issuance of a permit or license. Upon submission of documentation specified in the statute, the organization involved is automatically qualified to solicit funds. Furthermore, the reporting requirements approved by the district court are not so vague as to evade understanding by individuals of ordinary intelligence.[1] *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

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[1] The district court did invalidate two provisions of the statute that vested unbridled discretion in the attorney general to determine the completeness of the filing of the charitable organization or professional solicitor. The court determined that requirements that entities submit "full and fair" descriptions of the charitable program, O.R.C. § 1716.07(D)(2)(f), or "any other information that the attorney general may require," O.R.C.

The plaintiffs attempt to bolster an otherwise meritless challenge to the statute by citations to three cases in which the courts involved found that the governmental entities responsible for overseeing the registration of solicitors did exercise unbridled discretion in deciding whether to issue "identifications," "solicitation certificates," or "religious registration certificates." *See Hynes v. Mayor of Oradell,* 425 U.S. 610 (1976); *Conlon v. City of North Kansas City,* 530 F.Supp. 985 (W.D.Mo.1981); *Sylte v. Metropolitan Gov't of Nashville,* 493 F.Supp. 313 (M.D.Tenn.1980). In all three of those cases, however, the governmental entities were required by statute to issue some sort of permit or identification to the applicant and the registration requirements either were not specific enough or were dependent upon a governmental determination of sufficiency. None of those defects are present, however, in the portions of O.R.C. § 1716 upheld by the district court. As noted by the court in its ruling, "These sections of the statute require nothing from the attorney general other than ministerial actions. Judgment, discretion, evaluation are neither required nor permitted; there is no issuing, or withholding, of permits, licenses, approvals and authorizations based on the exercise of any judgment, discretion, or evaluation."

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§ 1716.07(B), lacked the specificity required to protect First Amendment freedoms. The defendant Fisher does not appeal those limited rulings of the district court.

Interestingly, the plaintiffs rely on these two invalidated provisions to bolster their argument that the statute as a whole is vague and without sufficient standards. Other provisions and requirements of O.R.C. § 1716 do not, however, suffer from the same malady as the subsections found to vest discretion in the hands of governmental entities.

4. Required Contractual Provisions

The plaintiffs submit that the statutory requirements that contracts between charitable organizations and professional fundraisers be in writing, clearly state the respective obligations of the parties, and contain the percentage of the gross revenue from the solicitation campaign that the charity will receive impermissibly burden the freedom of expression. In support of their argument on this issue, they refer this court to the *Riley* opinion of the Supreme Court.

In *Riley*, the Court did conclude that statutory *limits* on the fee percentage that a charity could pay to a professional fundraiser unconstitutionally restricted free speech because "there is no nexus between the percentage of funds retained by the fundraiser and the likelihood that the solicitation is fraudulent." *Riley*, 487 U.S. at 793. In this case, however, the challenged statute does not attempt to dictate an appropriate fee level to be included in the contract. Instead, the provisions of O.R.C. § 1716.08(A) simply require the *disclosure* of such information so that interested individuals can make an informed decision on where to direct their charitable dollars. *See also Famine Relief Fund v. West Virginia*, 905 F.2d 747, 752 (4th Cir.1990) (state can require disclosure of percentage fee in contract because such information only provides greater detail and description to information already disclosed in financial statements that can be required by state law to be filed with a state agency). The district court did not abuse its discretion in concluding that the plaintiffs failed to demonstrate a substantial likelihood of success on the merits of this claim.

5. Point of Solicitation Disclosures

Pursuant to the provisions of O.R.C. § 1716.08(B), a professional solicitor, prior to requesting a contribution verbally, or at least contemporaneously with a written request for a donation, must provide the solicited individual with certain information. At the point of solicitation, the solicitor must disclose the solicitor's name and status as a professional fundraiser, the name and address of charities to receive the requested donation, and the charitable purposes to be advanced with the funds raised (if the charity is not registered as a § 501(c)(3) entity). Additionally, if requested by the person being solicited, the fundraiser must inform the individual of the percentage of gross revenue that will be turned over to the charitable organization. The plaintiffs, again relying upon *Riley*, contend that such compelled speech violates the First Amendment.

In *Riley*, the Supreme Court invalidated a provision of a North Carolina statute that mandated, *in all cases*, disclosure of the percentage of charitable funds collected in the previous year that were actually turned over to charity. *Id.*, 487 U.S. at 795-98. Although determining that such a requirement was not narrowly tailored to meet a compelling state interest, the Court noted that other, more narrowly drawn portions of the North Carolina statute allowed the state to accomplish the same goals. Specifically, the Court referred to unchallenged provisions of the statute that required disclosure of professional fundraising status and, *upon request*, the percentage of contributions submitted to the charity. *Id.*, 487 U.S. at 799. In *dicta*, the Court stated:

> The Act, as written, requires the fundraiser to disclose his or her employer's name and address. Arguably, this may not clearly convey to the donor that the solicitor is employed by a for-profit organization, for example, where the employer's name is "Charitable Fundraisers of America." However, nothing in this opinion should be taken to suggest that the State may not require a fundraiser to disclose unambiguously his or her professional status. On the contrary, such a narrowly tailored requirement would withstand First Amendment scrutiny.

Id. at 799 n. 11. *See also Famine Relief Fund*, 905 F.2d at 751-52. Furthermore, the Court recognized:

> And, of course, a donor is free to inquire how much of the contribution will be turned over to the charity. Under another North Carolina statute, also unchallenged, fundraisers must disclose this information upon request. N.C.Gen.Stat. § 131C-16 (1986). Even were that not so, if the solicitor refuses to give the requested information, the potential donor may (and probably would) refuse to donate.

Riley, 487 U.S. at 799.

Although *dicta*, the comments made by the Supreme Court in *Riley* regarding "point of solicitation disclosures" provide insight into the Court's inclination regarding the legality of such requirements. In light of those statements, we cannot say that the district court abused its discretion in concluding that the plaintiffs failed to establish a substantial likelihood of success on the merits of this claim. This challenge to the district court's order is thus also without merit.

6. Fee and Bond Requirements

In yet another challenge to the constitutionality of O.R.C. § 1716, the plaintiffs contend that requiring non-exempt charities to pay a fee based on the amount of contributions received unduly burdens the exercise of free speech. Similarly, the plaintiffs contest the legality of assessing a fee and imposing a $25,000 bonding requirement on professional solicitors.

In *Cox v. New Hampshire*, 312 U.S. 569 (1941), the Supreme Court upheld a state statute requiring payment of a licensing fee of not more than $300 before parading on public streets. The Court justified the burden imposed upon the exercise of First Amendment rights by recognizing the necessity of allowing a municipality to recoup its costs for the maintenance of order.

In 1943, the Court was again faced with a challenge to a law requiring payment of a fee as a condition of exercising free speech rights. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943). Because the flat fee at issue in Murdock was "unrelated to the scope of the activities of petitioners or to their realized revenues," the Court invalidated the requirement for payment of what amounted to a licensing tax. In discussing the reasons for striking down the ordinance, the Court also noted that it was "not a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question." *Id.* at 113-14.

Based upon that quoted language from the Murdock opinion, the district court in this case assumed that any fee imposed on the exercise of First Amendment rights must be nominal in order to withstand constitutional

scrutiny. In fact, however, the Supreme Court has specifically rejected that idea and concluded that the ideas expressed in *Murdock* do not mean "that an invalid fee can be saved if it is nominal, or that only nominal charges are constitutionally permissible." *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, ___, 112 S.Ct. 2395, 2405 (1992). Instead, the Court stated that "[t]he tax at issue in *Murdock* was invalid because it was unrelated to any legitimate state interest, not because it was of a particular size." *Id.*

In this matter, the district court found that the fees imposed upon charitable organizations, based upon their revenue in the prior year, "are related to the costs of administering the charitable solicitation statute" that seeks to deter fraud. Furthermore, because the bonding requirement imposed upon professional solicitors also attempts to deter fraud and to provide a fund from which to compensate charities for moneys lost or misappropriated by the professional solicitors, the district court concluded that the requirement was narrowly tailored to serve a legitimate state interest. Consequently, under the rationale advanced in *Cox*, *Murdock*, and *Nationalist Movement*, the plaintiffs have failed to establish, at this point in the proceedings, that the fee and bonding requirements of O.R.C. § 1716 unduly burden their free speech rights. At the hearing on the plaintiffs' request for a permanent injunction, however, the plaintiffs will be free to introduce evidence that the fees charged under the statute are not intended or are not used to defray the state's administrative costs associated with the regulation of charitable solicitations and are, therefore, unconstitutional impediments to free speech.

7. Bank Account Requirements

The plaintiffs next challenge the statutory requirement that professional solicitors deposit money collected for a charity into a bank account over which the charity has sole control. The plaintiffs argue, weakly, that such a mandate is paternalistic and that, although the state has a legitimate interest in seeing that the charity's funds are deposited into an account to which the charity is *a* signatory, there is no need to require the charitable organization to be the *only* signatory on the account.

As noted by the district court in its ruling on this issue, however, the challenged provision of the statute "regulates the control of funds received and access to those funds once they are deposited; it does not implicate speech rights at all." Thus, "it is difficult to imagine how this regulation may affect the content or frequency of any speech." The district court did not abuse its discretion in concluding that the plaintiffs have not shown a substantial likelihood that they could succeed on the merits of this attack on the charitable solicitation statute.

8. Restrictions on Employment of Felons

Pursuant to the provisions of O.R.C. §§ 1716.05 and 1716.07, individuals convicted within the previous five years of a felony or of a violation of the charitable solicitation laws may not be employed as a paid fundraising counsel or a professional solicitor. The plaintiffs challenge this restriction on employment as a prior restraint on speech that fails to pass constitutional muster.

In support of their position, the plaintiffs cite, among other cases, *International Society for Krishna Consciousness v. Eaves*, 601 F.2d 809 (5th Cir.1979). In that case, the Fifth Circuit had no difficulty in invalidating a provision of an Atlanta ordinance that rescinded, upon conviction of certain violations of the ordinance, a permit required to distribute literature or solicit funds in the Atlanta airport. The court concluded that the rescission provision "is simply a recipe for an unlawful prior restraint." *Id.*, 601 F.2d at 832.

The provision at issue in this case is significantly different from the ordinance analyzed in *International Society for Krishna Consciousness*. Unlike the Atlanta ordinance, the Ohio charitable solicitation statute does not completely bar an individual from exercising protected First Amendment freedoms. While violation of the Atlanta law resulted in banishment from airport soliciting or literature distribution, conviction of a felony or solicitation offense under the Ohio law bars the individual only from serving as a *paid* solicitor. Other aspects of the exercise of free speech are unaffected. Moreover, as noted in *dicta* in *Schaumburg v. Citizens for a Better Environment*, decided *after* International Society for Krishna Consciousness, a "provision making it unlawful for charitable organizations to use convicted felons as solicitors . . . may bear some relation to public safety." *Schaumburg*, 444 U.S. at 638. Thus, we conclude that the district judge in this case did not abuse his discretion in concluding that the plaintiffs could not establish a substantial likelihood of success on this issue.

9. Vagueness of Penalty Provisions

In their final challenge to the Ohio Charitable Solicitations Act in this appeal, the plaintiffs contend that the description of acts and practices that are prohibited by the statute is unconstitutionally vague and lacking in a scienter requirement. The district court disagreed and concluded that the statutory provisions were understandable by persons of ordinary intelligence and that Ohio law supplies a recklessness requirement in situations such as this where no explicit scienter standard is specified.

For statutes to survive a vagueness challenge, the Supreme Court requires "that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned*, 408 U.S. at 108. However, "[t]he degree of vagueness that the Constitution tolerates . . . depends in part on the nature of the enactment." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). "If, for example, the law interferes with the right of free speech . . . , a more stringent vagueness test should apply." *Id.* at 499.

The plaintiffs point to examples of language contained in the challenged statute that they contend fail to meet "a more stringent vagueness test." For instance, they emphasize the phrase "representation that implies" and allege that persons of ordinary intelligence are not informed by those words of the conduct that is prohibited. In this example, as in their other examples, however, the plaintiffs fail to place the allegedly vague phrase in its proper context. Pursuant to the provisions of O.R.C. § 1716.14(A)(3), persons are prohibited from "[u]sing any

representation that implies that the contribution is for or on behalf of a charitable organization, or using any emblem, device, or printed matter belonging to or associated with a charitable organization, without first having been authorized in writing to do so by the charitable organization." Read in that context, the phrase highlighted by the plaintiffs is not vague but, rather, clearly gives "the person of ordinary intelligence a reasonable opportunity to know what is prohibited." Likewise, all other examples of allegedly vague statutory provisions cited by the plaintiffs are, when placed in proper context, sufficiently clear to withstand review under even a stringent vagueness test.

Similarly without merit is the plaintiffs contention that the statute is unconstitutionally vague because it lacks a specified scienter requirement in regard to many of the practices or acts prohibited in the enactment. As noted by the district court, O.R.C. § 2901.21(B) provides that when a criminal statutory "section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense."

The plaintiffs insist that § 2901.21(B) has application only to *criminal* statutes and, therefore, does not provide a sufficient scienter requirement for the statutorily prohibited *civil* violations. Because a heightened level of *mens rea* is required in criminal acts that pose a possibility of loss of liberty, adoption of the criminal standard of culpability for those portions of § 1716 that impose civil liability would be sufficient to satisfy the requirements of due process. The plaintiffs are thus unlikely to succeed on the merits of this claim.

10. Required Written Commitment for Donated Tickets

Pursuant to the provisions of O.R.C. § 1716.08(D), a professional solicitor may not represent that tickets to charity events purchased, but unused, by contributors will be donated to others unless written commitments from the intended ticket recipients stating their intentions to use a specified number of the tickets are already on file with the attorney general. The district court preliminarily enjoined enforcement of this portion of the Ohio Charitable Solicitations Act, after determining that the provision amounted to a content-based restriction on speech that was not narrowly tailored to serve a compelling state interest. Before this court, the Ohio Attorney General contends that the district court erred in so ruling because the statute is a narrowly drawn attempt to prevent solicitation of contributions on false pretenses.

Any content-based restriction on speech "is subject to exacting First Amendment scrutiny" to ensure that the means chosen are not unduly burdensome and are narrowly tailored to serve the purposes for which the restriction was enacted. *Riley*, 487 U.S. at 798. The restrictions contained in O.R.C. § 1716.08(D) are clearly content-based because they apply only to one type of speech, efforts to "represent that tickets to any event will be donated for use by another person." As noted by the district court in this case, moreover, the justifications offered by the defendant for the restrictions, while laudable, are not the type of compelling interests justifying the infringement on the right of free speech. Additionally, the provisions of the statute are not so narrowly drawn as

to exclude from the restriction those solicitors that the provision did not intend to reach.

In support of the statutory scheme, the defendant argues that the challenged provisions assure that solicitors have a charitable beneficiary in mind prior to representing to donors that eleemosynary functions will be undertaken. Furthermore, the restrictions and filing requirements prevent solicitors from "dumping" unwanted or unusable tickets upon a group that has not received sufficient advance notice of the donation to make use of the gift. The district court correctly determined, however, that the statute's provisions, rather than merely regulating behavior to ensure fulfillment of the governmental goals, actually proscribe certain speech. As the district judge noted, "The state has other means of regulating the speaker's *conduct*: should the solicitor commit fraud, he may be investigated, charged, and convicted for that crime, or the state may prescribe the precise steps with which a solicitor must comply when attempting to donate tickets to charity." *See McIntyre v. Ohio Elections Comm'n*, 115 S.Ct. 1511, 1524 (1995) ("The State may, and does, punish fraud directly. But it cannot seek to punish fraud indirectly by indiscriminately outlawing a category of speech, based on its content, with no necessary relationship to the danger sought to be prevented.").

Because we find that the statutory provisions were not narrowly tailored to serve compelling state interests, we conclude that the district court did not abuse its discretion in concluding that the plaintiffs had a substantial likelihood of succeeding on the merits of their First

Amendment claim in this regard. Consequently, the district court properly ordered that enforcement of the provisions of O.R.C. § 1716.08(D) be preliminarily enjoined.

11. Limits on Solicitations for Distribution of Information Concerning Missing Children

The Ohio legislature, as part of the same bill that contained O.R.C. § 1716 (1990 House Bill 486), passed what was later codified as O.R.C. § 2901.32. Pursuant to subsection (A) of that statute, no organization may solicit funds "for the purpose of distributing materials containing information relating to missing children" without meeting certain requirements. Specifically, any such solicitor, without exception, must have been incorporated as a non-profit corporation for two years prior to the solicitation, must have been exempt from federal income taxes for two years prior to the solicitation, and must not use fundraising counsel, professional solicitors, commercial co-venturers, or other charitable organizations to solicit the contributions.

In resolving the plaintiffs' challenge to the constitutionality of the statute, the district court succinctly concluded that the provision was a content-based restriction on speech and that the state could identify no legitimate compelling interest to be served by the restriction. As a result, the court decided that the plaintiffs had demonstrated a substantial likelihood of success on the merits of their challenge to that statutory requirement.

The defendant recognizes that O.R.C. § 2901.32 enacts content-based restrictions on speech. The state attempts to justify those burdens, however, by arguing

that the State of Ohio has a compelling interest in protecting its children and that in order to provide such protection, the free speech rights of others may be sacrificed.

It is indisputable that state governments have important interests in seeking to secure the safety of their minor citizens. Unlike statutes prohibiting child pornography or statutes regulating access of juveniles to obscene material, however, O.R.C. § 2901.32 does not regulate activity or speech in which children are participants. Instead, the speech that the state seeks to regulate is speech that merely concerns the plight of unfortunate children. An argument could even be advanced that if the state's interest in securing the return of missing children is such a compelling one, regulations should seek to increase, rather than restrict, the number of people and organizations attempting to distribute literature about the missing individuals. Although concern about solicitors preying on the good intentions of citizens interested in securing the return of children to their families may be justified, the challenged provisions of O.R.C. § 2901.32 are not drawn narrowly enough to permit its blatant prior restriction on speech based solely on its content. The district court did not abuse its discretion in determining that the plaintiffs had a substantial likelihood of succeeding on the merits of their claim that O.R.C. § 2901.32(D) impermissibly burdens the exercise of protected First Amendment freedoms.

B. Possibility of Irreparable Harm to the Plaintiffs

After examining a plaintiff's likelihood of success on the merits of their claims, a court must balance those

conclusions and findings with other factors, including the possibility that denial of a preliminary injunction will cause irreparable harm to the plaintiff. In a plurality opinion, the Supreme Court has recognized that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373.[2] Consequently, to the extent that the plaintiffs have established a substantial likelihood that they could succeed on the merits of their First Amendment claims, they have also established the possibility of irreparable harm as a result of the deprivation of the claimed free speech rights.

C. Probability That Injunction Will Harm Others

Furthermore, the issuance of a preliminary injunction against enforcement of those sections of the challenged statutes upon which the plaintiffs have demonstrated a substantial likelihood of success on the merits would not result in significant harm to the defendant or to others. The four components of the preliminary injunction merely mandate that appropriate individuals cease enforcing certain challenged provisions of the law until such time as a federal court may rule, after a full hearing, on the merits of the plaintiffs' constitutional challenges.

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[2] Although admittedly expressed only in an opinion signed by three justices of the Court, the principle expressed in the quoted language is hardly open to serious disagreement.

D. Advancement of the Public Interest

Finally, the public as a whole has a significant interest in ensuring equal protection of the laws and protection of First Amendment liberties. Thus, the public interest would be advanced by issuance of a preliminary injunction enjoining enforcement of those portions of the challenged statutes that are of questionable constitutionality.

CONCLUSION

The district court appropriately resolved the challenges raised by the plaintiffs to the charitable solicitation statutes at issue in this appeal. Furthermore, the court properly balanced the factors to be considered in determining whether to issue a preliminary injunction pending a full hearing on the merits of the claims raised in the litigation. After careful review, we therefore conclude that the judgment of the district court should be **AFFIRMED.**

ALAN E. NORRIS, Circuit Judge, concurring in part and dissenting in part.

While I concur with the conclusions reached by my colleagues in virtually every respect, I write separately because I believe that Ohio Rev.Code Ann. § 1716.80(D), which requires professional solicitors to obtain written commitments for donated tickets, passes constitutional muster.

Assuming that the provision imposes a content-based restriction on speech, it is neither unduly burdensome nor overly broad in view of the state's compelling interest

in ensuring that charitable solicitations are free from fraudulent representations.

The provision itself is certainly narrow inasmuch as it only affects those solicitors who use donated tickets as a means of increasing contributions. Further, the provision does not impose a limit on the number of tickets that can be given away; it merely requires that solicitors engage in a modicum of forethought by contacting the recipient organization before, rather than after, the fund-raising campaign. Seen in this light, the burden, if any, imposed on solicitors is minimal when balanced against the state's interest in ensuring that the tickets are used as represented.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DAYTON AREA VISUALLY IMPAIRED PERSONS, INC., et. al.,	:	Case No. C-3-91-186
Plaintiffs,	:	JUDGE WALTER HERBERT RICE
vs.	:	
LEE FISHER, ATTORNEY GENERAL OF OHIO, et. al.,	:	(Filed Aug. 2, 1993)
Defendants.	:	

DECISION AND ENTRY GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION (DOC. #3); DECISION AND ENTRY GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS OF DEFENDANT, LEE FISHER, ATTORNEY GENERAL OF OHIO (DOC. #23); CONFERENCE CALL SET.

Knowledge puffeth up, but charity edifieth.

I Corinthians 8:1 (King James).

Charity itself fulfills the law.

William Shakespeare, Love's Labor's [sic] Lost. Act IV, sc. 3, line 359 (B. Beckerman & J. Papp, eds., MacMillan 1968).

Would that it were always so.

Finding that some charities deceive, rather than edify, and violate, rather than fulfill, the law, Ohio's legislature enacted a comprehensive statute[1] regulating charities and professional fundraisers. This litigation represents a constitutional challenge to that statute. The three plaintiffs, Dayton Area Visually Impaired Persons, Inc. ("DAVIP"), the Wayne County Foster Parents Network ("FPN"), and the Ohio Telemarketing Association, Inc. ("OTA"), bring this section 1983 action against Lee Fisher, the attorney general of Ohio ("the State"); J. Anthony Sawyer, the City Attorney of Dayton; and Lee J. Falke, the Prosecuting Attorney of Montgomery County (collectively "defendants"), claiming that the statute violates the plaintiffs' first and fourteenth amendment rights. Docs. #11, #3. Plaintiffs seek a preliminary injunction ordering defendants not to enforce the statute (Doc. #3), a declaration that the statute is unconstitutional facially and as applied, as well as costs and attorneys' fees (Doc. #11).[2]

Introduction: The Statute and the Procedural Posture of the Case

A. The Statute

The statute enacts detailed regulations which apply to *some* of Ohio's charitable organizations and to *all*

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[1] House Bill 486, 1990 Ohio Laws 5356, codified at scattered sections of Ohio Revised Code § 1716 and at § 2901.32 (Anderson 1992).

[2] Plaintiffs originally sought a temporary restraining order. Doc. #4. The Court has denied this motion. Doc. #9.

professional fundraisers active in Ohio. Charitable organizations exempt from the statute include religious organizations, educational institutions, and any other institution which does not seek funds from the public or rely on a professional, in-house staff to solicit money. Charities raising minor amounts of money are also exempted from the statute. All other charities must comply with the statute's reporting requirements. No professional fundraisers are exempted from the statute; all such entities or persons must comply with its provisions. The statute regulates broadly, addressing issues ranging from procedures to follow with donated tickets to provisions to insert in contracts with professional fundraisers.

B. Procedural History

The plaintiffs initially moved for a preliminary injunction (Doc. #3) and a temporary restraining order (Doc. #4). The Court denied the motion for a temporary restraining order (Doc. #9) and held a hearing on the motion for the preliminary injunction on May 23, 1991. Doc. #22. The memorandum in support of the motion for a preliminary injunction asserted that five facial and fundamental defects rendered the *entire* statute unconstitutional. Doc. #5. The memorandum further asserted that, even if the statute *as a whole* were not unconstitutional, seven components of the statute, each comprising one or more sections or subsections of the statute, were facially unconstitutional. *Id.* Six days after the hearing on the plaintiffs' motion for a preliminary injunction, the state moved to dismiss the complaint, arguing that this Court lacked subject matter jurisdiction over the controversy, or in the alternative, that many, but not all, of the claims

failed to state a claim upon which relief could be granted. Doc. #23. After the hearing, plaintiffs and the State submitted extensive briefs on the motion to dismiss, as well as upon the motion for a preliminary injunction. As discussed in detail below, in briefing the motion to dismiss, neither the state nor plaintiffs addressed facts, other than facts which related to this Court's jurisdiction; therefore the Court has declined to treat said motion as a motion for summary judgment.

Against this background, the Court issues its rulings. Two principles govern the sequence in which the Court considers plaintiffs' claims.

The Court first rules on the state's motion to dismiss. If the state's motion to dismiss is sustained on a given *facial* challenge to a component of the statute, *i.e.*, if plaintiffs' challenge to a particular section or subsection does not state a claim upon which relief can be granted, the plaintiffs can not pursue that facial challenge. Plaintiffs' challenge to that section is, therefore, not considered on the motion for a preliminary injunction, since, by definition, plaintiffs do not have a likelihood of success on the merits of a challenge which does not state a claim for relief. Likewise, if the state's motion to dismiss is sustained on a given facial challenge to the *entire* statute, *i.e.*, if plaintiffs' challenge does not a state a claim upon which relief can be granted, plaintiffs can not pursue that facial challenge and same is not considered on the motion for a preliminary injunction.[3]

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[3] If an as-applied challenge is possible on identical legal grounds to the *entire* statute, or to a component thereof,

However, if the state's motion to dismiss is overruled on a given challenge to the *entire* statute or to a component thereof, this conclusion means simply that the plaintiffs have stated a claim for the facial invalidity of the statute or one, or more, of its sections or subsections. Whether such claim will be the subject of a preliminary injunction depends on the probability of success on the merits of that particular challenge, which requires a more detailed analysis.

Initially, the Court grants in part and denies in part the motion to dismiss. Doc. #23. The Court concludes that it is indeed vested with subject matter jurisdiction over the controversy, and also concludes that three of plaintiffs' claims fail to state a claim upon which relief may be granted. Because the Court grants the state's motion to dismiss with respect to these three claims, there is no need for these claims to be considered during the analysis of the motion for a preliminary injunction, since there can be no likelihood of success demonstrated upon the merits of these three facial challenges. Since plaintiffs assert *facial* challenges, the dismissal of these three facial challenges does not preclude, as a theoretical matter, the plaintiffs from requesting the Court's permission to file a second amended complaint to assert as-applied versions of those challenges.

The Court then grants in part and denies in part plaintiffs' motion for a preliminary injunction. Doc. #3.

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plaintiffs may petition the Court for leave to file a second amended complaint in order to assert an as-applied challenge on the legal theory under which its facial challenge has been found wanting.

On the motion for the preliminary injunction, the Court considers those claims which survived the motion to dismiss (*i.e.*, those claims wherein the Court overruled the motion to dismiss), as well as those claims which were not addressed by the state's motion to dismiss.[4]

The relationship between the facial challenges to the statute and the as-applied challenge is somewhat confusing. The Court presents its understanding of that relationship, *infra*, at pages 11-14. Briefly, the plaintiffs assert five facial challenges to the statute as a whole, seven facial challenges to components to the statute, and a single as-applied challenge to the statute, which incorporates five of the seven components operate together to burden plaintiffs' speech.

Finally, it is worth emphasizing the unusual *timing* of the motion to dismiss. The motion to dismiss was brought *after* the hearing for the preliminary injunction, *after* the Court received oral and deposition testimony regarding the factual context, albeit limited, of this dispute and *after* the Court learned of facts relevant to the as-applied challenges. Despite this timing, the motion to dismiss[5] relies

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[4] As indicated *supra*, the fact that a particular claim survives a motion to dismiss does not necessarily indicate that there is a likelihood of success on the merits of that claim.

[5] The motion's exact heading was: "Defendant Lee Fisher's Motion to Dismiss Plaintiffs' First Amended Complaint for Failure to State a Claim upon Which Relief Can be Granted *and* Motion to Dismiss or in the Alternative Motion for Summary Judgment for Lack of Subject Matter Jurisdiction." Doc. #23 at 1(emphasis added). This heading, and the parties' subsequent briefing of this motion, indicates that the motion was a straightforward motion to dismiss for failure to state a claim on some of

on few facts in presenting its arguments. The only facts it sets forth are those facts relevant to its challenge to this Court's jurisdiction. That portion of the motion which argues that some of plaintiffs' challenges fail to state a claim is slender in comparison to the jurisdictional portion of the motion and is devoid of facts. Doc. #23. Likewise, plaintiffs' response (Doc. #32) to the motion to dismiss focuses on the jurisdictional argument and responds to the failure to state a claim portion of the state's motion in just one and one-third pages of its nineteen pages. *Id.* at 18-19. In that brief section, there is no mention of even one fact from the preliminary injunction hearing or elsewhere. As the parties do not go beyond the pleadings in moving for dismissal for failure to state a claim, or in contesting that motion, the Court rules on the motion to dismiss as such, without considering the testimony adduced at the preliminary injunction hearing, and does not treat the motion to dismiss as a motion for summary judgment. To do so would do violence to the parties' perception of and treatment of the motion to dismiss.

After describing the complaint briefly, the Court grants in part and denies in part the motion to dismiss

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plaintiffs substantive claims, *i.e.* a motion to dismiss pursuant to Fed.R.Civ.P. 12(b) (6), *and* a motion to dismiss for want of subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1). Because the movant was apparently not aware that the Court can consider matters outside the pleadings to resolve a 12(b) (1) motion (or was determined to exercise an abundance of caution), it also moved, alternatively, for summary judgment on the jurisdictional claim, as it introduced facts in setting forth its jurisdictional arguments.

(Doc. #23), and then grants in part and denies in part the motion for the preliminary injunction (Doc. #3).[6]

I. The Amended Complaint (Doc. #11) and the Motion for a Preliminary Injunction (Doc. #3)

Three entities bring this action. DAVIP is an Ohio non-profit corporation which educates, supports, and promotes the economic, social, and cultural well-being of blind and partially sighted persons in the Dayton, Ohio, area. Doc. #11 at 2. Its membership includes blind, partially sighted, and fully sighted persons. *Id.* FPN is an unincorporated association of individuals licensed as foster parents in Wayne County, Ohio. *Id.* at 3. Founded in January of 1990, FPN's objectives include training foster parents, advocating for foster children, cooperating with governmental agencies working with foster children, and providing support for foster parents and the foster children under their care. *Id.*

OTA is a non-profit Ohio corporation with its principal offices in Willoughby, Ohio. *Id.* Its members include for-profit businesses which fundraise on behalf of charities and non-profit corporations in Ohio. *Id.* at 3-4. OTA sues on behalf of itself, its members, and its members' charitable and non-profit clients. *Id.* at 4.

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[6] The state has also moved to exclude various portions of the deposition testimony of Ronald Bacon, the president of OTA. Doc. #30 at 7. The Court hereby excludes those portions of the deposition identified by the state on the grounds that the testimony therein is hearsay. The Court does not consider such testimony in this decision.

Plaintiffs claim that sections of the Ohio statute regulating the solicitation of charitable contributions, the activities of charities using professional fundraisers, and the activities of those fundraisers, themselves, are unconstitutional.[7] The motion for a preliminary injunction seeks

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[7] The statutory provisions turn on definitions of two key terms.

Charitable organization is defined as a tax exempt organization under section 501(c)(3) of the Internal Revenue Code or "Any person that is or holds itself out to be established for any benevolent, philanthropic, patriotic, educational, humane, scientific, public health, environmental conservation, civic, or other eleemosynary purpose or for the benefit of law enforcement personnel, fire fighters, or other persons who protect the public safety, or any person who in any manner employs a charitable appeal as the basis of any solicitation or an appeal that suggests that there is a charitable purpose to any solicitation." Ohio R.C. § 1716.01(A)(1)(2).

Professional solicitor is defined as "any person who, for compensation, performs on behalf of or for the benefit of a charitable organization any service in connection with which contributions are or will be solicited in this state by the compensated person or by any person it employs, procures, or otherwise engages directly or indirectly to solicit contributions. 'Professional solicitor' does not include the following: (1) An attorney, investment counselor, or banker who in the conduct of his profession advises a client; (2) A charitable organization or a bona fide officer, employee, or volunteer of a charitable organization, when the charitable organization has full knowledge of the services being performed on its behalf and either of the following applies: (a) The services performed by the charitable organization, bona fide officer, employee, or volunteer are performed on behalf of the charitable organization that employs the bona fide officer or employee or engages the services of the bona fide volunteer; (b) The charitable organization on whose behalf the services are performed shares some element of common control or an historic or continuing relationship with the

an order enjoining defendants from enforcing the challenged sections of the statute. Doc. #3. Plaintiffs claim that five facial defects render the *entire* statute unconstitutional: its (1) differential treatment of small or unpopular charities that rely on professional fundraisers (*Id.* at 26-34); (2) exemption of religious organizations (*Id.* at 53-58); (3) registration and notice of solicitation requirements which function as an impermissible licensing scheme (*Id.* at 58-60); (4) allegedly inadequate procedural safeguards (*Id.* at 60-62) and (5) allegedly vague penalty provisions (*Id.* at 62-66).

Plaintiffs also challenge facially seven components of the statute, each comprising one or more sections or subsections: (1) the requirement that the contract between a charity and a professional solicitor contain specific clauses, ("required contractual clauses") section 1716.08(A); (2) the requirement that the solicitor make point of solicitation disclosures, section 1716.08(B); (3) the requirement that the professional solicitor shall limit their descriptions of the use of donated tickets, section 1716.08(D); (4) the requirements establishing registration fees for charitable organizations, section 1716.02(D), and

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charitable organization that performs the services or employs the bona fide officer or employee or engages the services of the bona fide volunteer; (3) An employer who is not engaged in the business of soliciting contributions or conducting charitable sales promotions but who incidentally solicits contributions for a charitable organization or purpose without compensation; (4) A compensated employee of an employer who is not engaged in the business of soliciting contributions or conducting charitable sales promotions, when the employee solicits contributions or conducts charitable sales promotions at the direction of his employer." Ohio R.C. § 1716.01(I).

registration fees and a bond requirement for professional solicitors, sections 1716.07(B) and (C), (5) the requirement of financial controls concerning charitable organizations' bank accounts; section 1716.07(F), (6) the prohibition against persons convicted of a felony in any state, or persons convicted of violating Ohio's charitable solicitation statute, from employment as a professional solicitor for five years following the date of conviction, section 1716.07(I); and (7) the requirements establishing three pre-conditions before an organization may solicit contributions to distribute information regarding missing children, section 2901.32. Doc. #5 at 34-53, 66-70.

Plaintiffs assert facial challenges and one as-applied challenge to the statute. The plaintiffs complicate, considerably, this Court's understanding of the complaint by failing to identify which challenges are brought on facial grounds and which are brought on as-applied grounds. To the best of this Court's understanding, the five challenges to the *entire* statute are asserted facially, as are the challenges to seven components of the statute. The sole as-applied challenge complements the facial challenges to the seven components of the statute: the as-applied challenge assumes the components are facially constitutional and then argues that five of the these seven facially valid regulations operate together to burden, in a constitutionally impermissible manner, the speech of the three plaintiffs herein. The Court, then, understands the as-applied challenge to incorporate, in a single claim, as-applied challenges to five of the seven challenged components of the statute.

This understanding of the complaint is consistent with the language and the structure of the amended

complaint and the memorandum in support of the preliminary injunction. Docs. #11, #5. Each initially asserts that the statute, on its face and as applied, is unconstitutional, yet supports that assertion with five challenges to the *entire* statute and seven challenges to components of the statute, none of which are identified as as-applied challenges. Doc. #11 at 16(emphasis added), Doc. #5 at 21.

Given that plaintiffs do not identify a single, specific as-applied challenge, yet consistently argue that the statute is unconstitutional as applied to their conduct, there are three possible interpretations of their argument: every facial challenge has a corresponding as-applied challenge, some facial challenges have a corresponding as-applied challenge, or no facial challenge has a corresponding as-applied challenge and plaintiffs simply erred in asserting they had an as-applied challenge. The Court rejects the last possible interpretation, as plaintiffs have consistently maintained they assert as-applied challenges. One document might contain an inadvertant [sic] error, it is unlikely that two or more do. The Court also rejects the interpretation that all challenges to the statute have corresponding as-applied challenges. The Court simply fails to understand how the five challenges to the *entire* statute constitutionally can be asserted in an as-applied manner.[8]

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[8] The Court concludes that the plaintiffs, because of the nature of their arguments, do not assert as-applied challenges to the defects which allegedly render the entire statute unconstitutional. For example, an as-applied challenge to a vague penalty provision would require that a plaintiff have suffered or be on the brink of suffering a statutorily defined penalty. Yet none of the three plaintiffs herein has been charged under the statute.

Nor does the Court comprehend how an as-applied challenge lies to the restrictions on employment of felons as professional solicitors, or on the requirements for raising funds for the purposes of distributing information about missing children.[9] By default, then, the Court is left with the understanding that the as-applied challenge incorporates, in appropriately modified form, the arguments contained in five of the seven challenges to the various components of the statute.

The foregoing understanding of the plaintiffs' legal theory – that it asserts five facial challenges to the *entire* statute, seven facial challenges to components of the statute, each comprising one or more sections of the statute, and a single as-applied challenge, alleging that the features of five of the challenged components of the statute, even if facially constitutional individually, together function as an unconstitutional burden on the speech rights of these plaintiffs – is consistent with the testimony adduced at the hearing on the motion for the preliminary injunction and in depositions. Facial challenges, of course, do

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Likewise, as another example, the Court does not understand how an as-applied challenge to the exemption for religious organizations would be asserted. If plaintiffs wish to bring such as-applied challenges, they may petition the Court for leave to file a second amended complaint.

[9] The Court fails to comprehend the manner in which plaintiffs could assert as-applied challenges to these two components of the statute. The relevant subsections contain blanket prohibitions; it is difficult to conceive how the constitutionality of such prohibitions could turn on their application to a particular factual scenario. The Court, therefore, concludes that the as-applied challenge rests on the operation of the remaining five challenged components of the statute.

not need any but the most minimal facts. *Rust v. Sullivan*, 111 S.Ct. 1759, 1767 (1991). However, the Court heard testimony regarding the burdens the statute would impose on *these* defendants, and such testimony touched on five of the seven components of the statute that plaintiffs challenged. On the basis of the language, structure and logic of the amended complaint, the memorandum in support of the motion for the preliminary injunction, and the testimony introduced, the Court concludes that in addition to the five facial challenges to the entire statute, and the seven facial challenges to components of the statute, the plaintiffs bring an as-applied challenge asserting that even if five of the seven allegedly unconstitutional components of the statute are ultimately determined to be constitutional individually, they operate together to burden, unconstitutionally, plaintiffs' speech.

As a general matter, "a facial challenge to a legislative act is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the . . . [statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render . . . [it] invalid." *Rust v. Sullivan*, 111 S.Ct. 1759, 1767 (1991). In the particular context of the first amendment, "to prevail on a facial attack, the plaintiff must demonstrate that the challenged law either 'could never have been applied in a valid manner' or that even though it may be validly applied to the plaintiff and others, it nevertheless is so broad that it 'may inhibit the

constitutionally protected speech of others.' " *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 11 (1988).[10]

II. Motion to Dismiss (Doc. #23)

The State has moved to dismiss, arguing, *inter alia*, that the Court lacks jurisdiction as there is no case or controversy between the parties, that the plaintiffs lack standing and, therefore that the action should be dismissed pursuant to Fed.R.Civ.P. 12(b)(1).[11] Docs. #23, #15 at 6-12. Additionally, the state has argued that seven of plaintiffs' challenges to the statute should be dismissed pursuant to Fed.R.Civ.P. 12(b)(6). Doc. #23. The Court first rules on jurisdictional portion of the motion to dismiss, then addresses the motion to dismiss directed at the legal sufficiency of the pleading of plaintiffs' claims, and

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[10] On the other hand, the Supreme Court has recognized that in the context of licensing statutes "placing unbridled discretion in the hands of a government official or agency [, thereby] constituting a prior restraint . . . [the] risks to free expression . . . [posed by such laws] can be effectively alleviated only through a facial challenge." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757 (1988).

[11] Defendant's claim that there is no Article III "case or controversy" merits little attention. There is a case or controversy between the parties sufficient to vest the Court with jurisdiction over this action. The statute regulates professional solicitors and their relationships to their clients, charitable organizations. Doc. #11. The plaintiffs, two charitable organizations and a membership organization for professional solicitors, challenge the statute on first and fourteenth amendment grounds. *Id.* As the statute imposes changes on the plaintiffs' everyday conduct, *Id.*, the Article III case or controversy requirement is fulfilled.

finally rules on plaintiffs' motion for a preliminary injunction concerning those claims which were not addressed by, or which survived, the motion to dismiss.

A. Standing – Rule 12(b)(1) Portion of Motion to Dismiss The Supreme Court recently summarized the doctrine of standing.

> The irreducible constitutional minimum of standing contains three elements: First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectural or hypothetical.' " Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be "fairly trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defenders of Wildlife, 112 S.Ct. 2130, 2136 (1992) (citations and footnote omitted, brackets and ellipsis in original). The Supreme Court noted that the party invoking federal jurisdiction bears the burden of establishing these elements, and that each element must be supported with the manner and degree of evidence required in successive stages of the litigation. *Id.* In considering a motion to dismiss for lack of jurisdiction, the court "may review any evidence, such as affidavits and testimony, to

resolve factual disputes concerning the existence of jurisdiction to hear the action." 2A James W. Moore et al., *Moore's Federal Practice* ¶ 12.07 at 12-46 (2d ed. 1993).

Each plaintiff has fulfilled the elements of injury in fact, causation, and redressibility. Consequently, each plaintiff has standing to assert its claims. DAVIP has utilized professional solicitors as its fundraisers (Johnson Dep. at 8-11) and plans to continue doing so (*Id.* at 34). DAVIP, therefore, is subject to the statute's requirement that charitable organizations "intend[ing] to . . . have contributions solicited on its behalf by any . . . professional solicitor" register with the attorney general. Ohio R.C. § 1716.02(A). The exemption from registration in section 1716.03 does not apply as DAVIP's proceeds exceed the $25,000 limit on gross revenue placed on exempt organizations.[12] Ohio R.C. § 1717.03(E). Consequently, DAVIP has sufficiently claimed that the statute will cause a concrete and imminent injury to its interests. The other two requirements of standing – causation and redressibility – are also fulfilled. The statute causes harm to DAVIP's interests; enjoining enforcement of the statute will likely redress DAVIP's injury. However, DAVIP lacks

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[12] Doreen Johnson, the president of DAVIP, stated that during 1990, DAVIP netted between $7,500 and $8,000 by using a professional solicitor to put on a large production show. Johnson Dep. at 9. During 1990, DAVIP, in addition to the funds realized through the show, received $8,500 in contributions. *Id.* at 16-17. Given that professional solicitors' contracts provide that the charity on whose behalf the solicitor raises funds receives between 16% and 50% of the gross receipts, less costs, DAVIP likely exceeded the limit for exemption in 1990. Johnson Dep. Att. 3 at 3, Winkowski Dep. at 56, Winkowski Dep. Ex. #4.

standing to challenge one section of the statute – that which places restrictions on the organizations intending to solicit funds for missing children, Ohio R.C. § 2901.32. DAVIP's president testified that her organization has no interest in soliciting contributions for distributing information regarding missing children. Johnson Dep. at 35. Therefore, DAVIP lacks standing to challenge that portion of the statute.

FPN, an unincorporated association, fundraises in a modest, informal manner – by posting signs in local merchants' stores asking for contributions. Winkowski Dep. at 43, 45, Dep. Ex. #1 at 1. Prior to commencement of this lawsuit, FPN had just $110 in its bank account. Winkowski Dep. at 45. FPN engaged a professional solicitor to produce a fundraising benefit on its behalf, but canceled the contract because it was unable to comply with the statutory registration requirements. *Id.* at 13-14. FPN, as it hoped to rely on a professional solicitor, is not exempt from the statute. Ohio R.C. § 1716.03(E). Consequently, FPN has shown a past and continuing concrete injury which fulfills the injury in fact requirement of standing. FPN, has also fulfilled the other two requirements of standing – causation and redressibility – for the same reasons as has DAVIP. *See supra,* at p. 17. Consequently, FPN has standing to assert the challenges identified in the motion for a preliminary injunction. However, Ms. Winkowski, FPN's chairperson, stated during her deposition that FPN had no intention of soliciting contributions for the distribution of information regarding missing

children (Winkowski Dep. at 45-46). Therefore, FPN lacks standing to challenge that portion of the statute.[13]

OTA also has standing to challenge this statute. OTA's members are professional solicitors who fundraise on behalf of charitable organizations in Ohio. Doc. #11 at 3-4. OTA has standing to sue on behalf of its members. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977) (stating the three-part test for associational standing: organization's members would otherwise have standing; organization's purpose consistent with the interests asserted; and neither the claim nor the requested relief require the participation of individual members of the lawsuit.) As one of OTA's members testified that "I personally have turned down several [offers to work for] missing children organizations . . . [in] Ohio. . . . I would like to do business with a couple of them, but I have turned them down," Bacon Dep. at 72, OTA has standing to challenge the section of the statute relating to missing children. That same individual also stated that "there are

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[13] The State argues that Winkowski stated that FPN did not object to other portions of the statute. Doc. #30 at 2-4. The State mischaracterizes Winkowski's language. Winkowski, at most, expressed a willingness to take certain actions, as they were described by counsel for the defendants; she did not withdraw objections to the statute itself. The Court concludes that the deposition reveals a layperson who is dissatisfied with the impact of the statute on her organization. There is no need for Winkowski, who has graduated from high school and has some college education (Winkowski Dep. at 10), to demonstrate a comprehensive understanding of the statute's multiple provisions in order to show that her organization has standing to bring this lawsuit. Were such a rule adopted, only the most learned plaintiffs could gain access to the judicial branch.

some organizations within OTA that . . . [when] . . . they . . . can't find [employees], they will go to the parole board." *Id.* at 99. OTA therefore has standing to challenge the section of the statute prohibiting felons from employment as professional solicitors. Considering the allegations of the three organizations together, plaintiffs have standing to assert all the claims contained in the amended complaint.

B. Legal Sufficiency of the Pleading of Plaintiffs' Claims – Rule 12(b)(6) Portion of the Motion to Dismiss

1. Introduction

The Court now rules on the State's motion to dismiss[14] seven of the substantive claims.[15] Doc. #23. In ruling on a motion to dismiss, pursuant to Rule 12(b)(6), for failure to state a claim upon which relief can be granted, a court must accept the allegations in the complaint as true and construe those allegations in the manner most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). The question is not whether it

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[14] For the reasons stated *supra*, the Court already denied that portion of the motion to dismiss directed at jurisdictional issues. As the parties' briefing of this portion of the motion to dismiss was limited to the pleadings, it would be inappropriate to treat this motion as a motion for summary judgment.

[15] The State also argued that venue in the Western Division of the Southern District of Ohio was improper. For the reasons stated in this Court's denial (Doc. #48) of the State's motion to change venue (Doc. #7), venue is proper in this division of the Southern District.

appears the plaintiff will ultimately prevail or even whether recovery under the complaint appears remote or unlikely. *Id.* Rather, a complaint cannot be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

2. Discussion

Three Supreme Court decisions, *Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988), *Secretary of State v. Joseph H. Munson, Co.*, 467 U.S. 947 (1984), *Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), apply first amendment doctrine to limit governmental regulation of charitable solicitation. The decisions establish a three part test to evaluate such regulations. The Court examines

> 1. whether the statute constitutes a direct and substantial burden on free speech,
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> 2. whether the statute serves an important governmental interest, and
>
> 3. whether the statute is narrowly drawn to serve the interest without unnecessarily interfering with free speech.

Riley, at 787-90, *Schaumberg* at 636. Finally, the "state bears the burden of showing that its regulation is narrowly tailored to further a strong, subordinating interest [it] is entitled to protect." *Telco Communications, Inc. v. Carbaugh*, 885 F.2d 1225, 1230 (4th Cir. 1989), *cert. denied*, 495 U.S. 904 (1990).

The three precedents also outline the boundaries of permissible regulation of charitable speech. The regulation of speech based on the percentage of fees retained by charities or received by professional fund-raisers is unconstitutional, *Riley* at 787-95, *Schaumberg* at 635-39, *Munson* at 962-68, while requiring charities to provide financial disclosure to the state is constitutional, *Schaumberg* at 637-38 and nn. 11-12, *Riley* at 788. On the other hand, mandating that the fundraiser include, as a part of its solicitation of funds, a statement of the percentage of funds turned over to charity, is an unconstitutional interference with charitable speech. *Riley* at 795. Nor is the state permitted, under the guise of combating fraud, to determine that a specific percentage fee is unreasonable or excessive and therefore to restrict speech based on such a fee. *Riley* at 793. Nor may the state, while reviewing the information submitted by a charity in accord with a licensing statute, indefinitely delay a decision on the application and therefore deny the charity's speech rights. *Riley* at 802.

In addition to these protections applicable to charitable solicitation, general first amendment doctrine holds

> Government can "abridge" speech in either of two ways. *First*, government can aim at ideas or information, . . . *[s]econd* . . . government can constrict the flow of information and ideas while pursuing other goals. . . . Any adverse government action aimed at communicative impact is presumptively at odds with the first amendment. . . . Where government aims at the noncommunicative impact of an act, the correct result in any particular case . . . reflects some balancing of . . . competing interests.

Laurence H. Tribe, *American Constitutional Law*, § 12-2, 789-791 (2d ed. 1988). "Under the first amendment, government actions receive a much higher degree of scrutiny when those actions are aimed at restricting the content of speech than when the burden on the protected activity is an incidental consequence of other legitimate governmental concerns." *Avery v. Jennings*, 786 F.2d 233, 236 (6th Cir.), *cert. denied*, 477 U.S. 905 (1986). Where the governmental regulation focuses on the content of the speech, the regulation is unconstitutional unless it "is necessary to serve a compelling state interest and . . . is narrowly drawn to achieve that end." *Americans United for Separation of Church and State v. City of Grand Rapids*, 980 F.2d 1538, 1541 (6th Cir. 1992).

On the other hand, where government aims at the non-communicative aspect of speech, *i.e.* "so-called 'content neutral' time, place and manner regulations [, such regulations] are acceptable so long as they are designed to serve a substantial government interest, and do not unreasonably limit alternative avenues of communication.' " *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 47 (1986). A regulation meets this standard when it does not " 'burden substantially more speech than is necessary to further the government's legitimate interests.' At a minimum . . . the cost to speech [must be] 'carefully calculated' and the fit between the burden and the state interest [must be] 'reasonable.' The government bears the burden of establishing that the regulations are reasonable." *Hays County Guardian v. Supple*, 969 F.2d 111, 118 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1067 (1993). Fortified with these jurisprudential guides, the Court sets forth

into an analysis of the statutory regulation of charitable organizations and professional solicitors.

Plaintiffs challenge seven components of the regulatory scheme, each comprising one or more sections or subsections of the statute, as violative of speech rights guaranteed by the first amendment. The State moves to dismiss five of the seven challenges to components of the statute, as well as one of the challenges to an alleged defect which renders the *entire* statute unconstitutional, the registration and notice of solicitation requirements. Doc. #23. The State also moves to dismiss the as-applied challenge, to wit: that five of the components operate as an unconstitutional burden on the speech of the plaintiffs herein.[16]

(1) Point of Solicitation Disclosures

The statute requires a professional solicitor, before requesting a contribution, to disclose his name, the fact that the solicitation is being conducted by a professional solicitor, the name and address of the organization which

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[16] The motion to dismiss is not a model of clarity. The state identifies six of the challenged components to the statute upon which it seeks dismissal. Doc. #23 at 13-14. However, the state names one claim – the requirement that the professional solicitor maintain certain financial records for three years, R.C. § 1716.07(G) – that plaintiffs do not appear to have asserted. *Compare*, Doc. #23 at 13 with the amended complaint, Doc. #11 at 16-18 ("Claims for Relief"). The Court does not consider this portion of the motion to dismiss. As a practical matter then, the state's motion to dismiss is directed at five of the plaintiffs' seven challenged components of the statute, one of the alleged defects in the entire statute, and the as-applied challenge.

will use the contribution, and, if the organization is not tax-exempt, the charitable purpose to be advanced with the funds solicited. R.C. § 1716.08(B)(1). Additionally, the statute requires that, if requested by the person being solicited, the solicitor must reveal the percentage of gross revenue that the charitable organization will receive from the solicitation campaign. R.C. § 1716.08(B)(2).

These statutory commands to reveal certain information are consistent with the first amendment; plaintiffs' challenge to this section of the statute does not state a claim upon which relief may be granted. In *Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988), the Court determined that, under limited circumstances, government may require professional fundraisers to disclose factual information. While the Court struck down a North Carolina statute requiring professional fundraisers to disclose the percentage of contributions within the previous twelve months actually turned over to charity, on the grounds that the statute was "content-based regulation . . . subject to exacting scrutiny" and neither served a compelling state interest nor was narrowly drawn, *Id.* at 795-801, the Court explicitly endorsed the required disclosure of certain facts. In dictum,[17] the Court noted:

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[17] The Fourth Circuit mistakenly stated that "The Court, however, *held*, that a requirement that a fund-raiser disclose his employer's name and address and his professional status would withstand first amendment scrutiny." *Famine Relief Fund v. West Virginia*, 905 F.2d 747, 752 n.3 (4th Cir. 1990) (citation omitted, emphasis added). As the section of the statute which required donors to disclose their professional status was not before the Court, *Riley*, 487 U.S. at 786, 799, the Court's views, expressed in footnote 11 in *Riley*, do not constitute a holding.

"nothing in this opinion should be taken to suggest that the State may not require a fundraiser to disclose unambiguously his or her professional status. On the contrary, such a narrowly tailored requirement would withstand First Amendment scrutiny." *Id.* at 799 n.11.

This dictum, and the rationale in *Riley*, govern this Court's analysis of the required point of solicitation disclosures.[18] The dictum explicitly states that the disclosures are consistent with the first amendment. The Supreme Court's differentiation between the constitutionality of requiring disclosure of the solicitor's name, and the name, address, and professional status of the professional fundraising organization on the one hand, and the unconstitutionality of requiring disclosure of the percentage of funds raised and turned over to charity on the other, rests on the Court's view of the impact of such disclosures. The mandatory disclosure of the name, address, and professional status of the solicitor informs the public of the identity of the speaker in what would be

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[18] This Court did not locate, nor did Plaintiffs cite, any subsequent decision at variance with the Court's determination above with reference to footnote 11 in the *Riley* decision. Two decisions, *Telco Communications*, 885 F.2d at 1232, and *Indiana Voluntary Firemen's Association, Inc. v. Pearson*, 700 F. Supp. 421, 441 (S.D.Ind. 1988), have recognized footnote 11 as persuasive and binding, respectively. One commentator has argued that the logic of the footnote "is contrary to the [Supreme] Court's own reasoning in *Riley*." Leslie G. Espinoza, *Straining the Quality of Mercy: Abandoning the Quest for Informed Charitable Giving*, 64 S.Cal.L.Rev. 605, 627 (1991). Notwithstanding the doctrinal inconsistencies in *Riley*, until the Supreme Court or the Sixth Circuit modify the mandate in footnote 11 of *Riley*, this Court considers itself bound by the Supreme Court's explicit dictum.

at most, a mildly intrusive and/or potentially anonymous encounter. Following the disclosure, the person solicited knows the identity of the caller. However, the required disclosure of the percentage of solicited funds turned over to the charity requires a speaker to alter the substance of his message, and burdens the speech of those charities which benefit from the very act of soliciting funds and putting their name and ideas into the public domain. Following this disclosure, the person solicited could well be inclined to end the conversation. The point of solicitation disclosures at issue, contained in R.C. § 1716.08(B), are constitutional: they comply with the dictum in *Riley*, they require identification only, and they do not burden protected speech.

The statutory command that, if requested by the person being solicited, the professional solicitor disclose the percentage of gross revenue the charitable organization will receive from the solicitation campaign, R.C. § 1716.08(B)(2), is also constitutional. In *Famine Relief Fund v. West Virginia*, 905 F.2d 747 (4th Cir. 1990), the appellate court held that a similar required disclosure upon request statute was constitutional, as it did not compel speech and served the state's interest in preventing fraud. Implicit in the appellate court's analysis was the understanding that requiring a truthful response to an independent request for information – by the person solicited – was distinct from requiring such speech without such an inquiry. That same understanding applies here: requiring a truthful response to a request for information, where such information is already on file with the state, burdens no speech rights, as the information has already been provided to the government. Moreover,

the required truthful response is but an administrative short-cut, facilitating the transmission of information, already in the state's possession, to interested members of the public. Such a requirement is also consistent with providing the public information about the charity in question, and charitable giving in general, themselves important state interests. *Telco Communications* at 1231. Accordingly, this section of the statute is constitutional. Hence, the Court grants the state's motion to dismiss plaintiffs' claims directed to subsections 1716.08(B)(1) and (2) of the statute, as plaintiffs' challenges to those sections of the statute do not state a claim upon which relief can be granted.[19]

(2) Required Contractual Clauses for Professional Solicitors

The statute requires that all contracts between a professional solicitor and a charitable organization shall be in writing, shall state clearly the parties' obligations, and shall "contain the percentage of the gross revenue from the solicitation campaign that the charitable organization shall receive." R.C. § 1716.08(A). The statute further requires that the percentage of gross revenue set aside for the charitable organization shall be "either a fixed percentage of the gross revenue or a reasonable estimate of the percentage of the gross revenue." *Id.* If the professional solicitor's compensation is contingent upon the number of contributions or the amount of revenue, the

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[19] This challenge is a facial challenge, as it asserts that the statute is inconsistent with first amendment jurisprudence, without pointing to facts in support of this reasoning.

contract must state the compensation as a fixed percentage of the gross revenue. R.C. § 1716.08(A)(1). If the professional solicitor's compensation is *not* contingent, the statute requires that the stated percentage of gross revenue be a reasonable estimate of the gross revenue and the contract shall state the assumptions upon which the estimate is based, and shall contain a clause guaranteeing the charitable organization receive ninety percent of the estimated revenue. R.C. § 1716.08(A)(2). Finally, the percentages required by the statute shall exclude any amount the charitable organization pays as expenses of the solicitation campaign. R.C. § 1716.08(C).

Plaintiffs argue that these regulations – concerning the contracts between professional solicitors and charitable organizations and the manner in which the fees charged by solicitors are defined – constitute a substantial burden on speech. The required contractual provisions, according to plaintiffs, violate *Riley*'s teaching that governmental regulation of the fee a professional fundraiser may charge is unconstitutional. Doc. #5 at 34-38. Such allegations state a claim upon which relief can be granted under *Riley* and general principles of first amendment jurisprudence; accordingly, the state's motion to dismiss, directed at subsections 1716.08(A) and (C), is denied.[20]

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[20] This claim is a facial challenge, as it asserts legal arguments without supporting facts.

(3) Limitations on Professional Solicitors' Speech Concerning Donated Tickets

The statute first prohibits a solicitor from stating that tickets to an event will be donated to a charity for use by another person unless (1) the charity specifies in writing the number of tickets it will accept, and (2) the written commitments are filed with the attorney general prior to the start of the solicitation. R.C. § 1716.08(D)(1). Second, the statute provides that contributions solicited for donated tickets may not exceed the amount needed to cover the written commitments for tickets on file with the attorney general, as required in the section 1716.08(D)(1). R.C. § 1716.08(D)(2).[21]

Plaintiffs claim that such regulations burden speech. Under *Riley* and related case law, as well as under general first amendment principles, such a claim is sufficient to withstand a motion to dismiss. Initially, the regulation controlling speech is based on the content of the speech. "[T]he government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). To evaluate the content-neutrality of legislation,

> the government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of the expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not

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[21] These subsections are functionally inseparable. The requirements of the second subsection incorporate by reference the terms of the first subsection. Accordingly, they stand or fall together.

> others. Government regulation of expressive activity is content-neutral so long as it is '*justified* without reference to the content of the regulated speech.'

Id. (citation omitted).

The regulation herein is content-based. The statute targets a message based on its content, to-wit: the solicitation of tickets to donate to a charity. The regulation effects [sic] no other type of message and is not justified without reference to its content. As a content-based regulation, section 1716.08(D) is subject to "exacting First Amendment scrutiny," *Riley* at 798, or, more specifically, the reviewing Court determines if the "regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Boos v. Barry*, 485 U.S. 312, 321 (1988).

Plaintiffs have alleged that the requirements on ticket distribution procedures limit solicitation and therefore implicate speech rights under *Riley*. This allegation, joined with the explicit limitation on speech, is sufficient to state a claim upon which relief can be granted. Hence, the Court denies the state's motion to dismiss directed to subsection 1716.08(D) of the statute.[22]

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[22] This claim is a facial challenge, as it asserts legal arguments without supporting facts.

(4) Registration Requirements

Plaintiffs challenge one of the defects which allegedly render the *entire* statute unconstitutional – its requirement that charitable organizations and professional solicitors register with the state. Plaintiffs claim that the vagueness of the registration requirements provides the state with unchecked discretion to deny permission to charities to solicit funds and consequently the registration requirements operate as an unconstitutional licensing scheme. Doc. #5 at 58-60. Plaintiffs identify sections[23] of the statute which are allegedly vague and argue that these sections can be manipulated by the attorney general to prohibit constitutionally protected activity. *Id.* at 59. The state has moved to dismiss the plaintiffs' claim that the registration requirements are unconstitutional.

The constitutionality of a licensing statute turns on whether sections of this statute "subjecting the exercise of First Amendment freedoms to the prior restraint of a

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[23] The allegedly vague sections of the statute include: "the attorney general, by rule, *may*, require additional information as part of the annual financial report" (R.C. § 1716.04(B) (emphasis added)); the annual financial reports must set forth "the charitable purpose or purposes for which the contributions to be solicited are to be used," and "the schedule of activities to be carried on by the charitable organization" (R.C. § 1716.02(B)(4), (10), (14)); the registration statement for professional solicitors must contain "any other information that the attorney general may require" (R.C. § 1716.07(B)); and, finally, the solicitation notice must include the "fundraising methods to be used" and a "full and fair description of the charitable program for which the solicitation campaign is being carried out" (R.C. § 1716.07(D)(2)(a), (b)). The plaintiffs' vagueness challenge to the statute is addressed *infra*.

license [contain] 'narrow, objective, and definite standards to guide the licensing authority.' " *Forsyth County, Georgia v. Nationalist Movement*, 112 S.Ct. 2395, 2401 (1992) (citations omitted). While the statute lacks a licensing component as such, the act of soliciting contributions without having complied with the registration requirements is solicitation fraud, a first degree misdemeanor. R.C. §§ 1716.14(B), 1716.99(A). Hence, despite the absence of an explicit licensing requirement, the statute does define procedures which those subject to its provisions must follow. The Court, consequently, examines whether these procedures contain narrow, objective and definite standards which insure that those subject to the statute may ascertain if they are in compliance with its provisions.

The statute requires charitable organizations to submit an annual financial report containing:

> (1) A balance sheet;
>
> (2) A statement of support, revenue, and expenses, and any changes in the fund balance;
>
> (3) The names and addresses of the charitable organizations, fund-raising counsel, professional solicitors, and commercial co-venturers used, if any, and the amounts of money received from each of them, if any;
>
> (4) A statement of functional expenses that shall include, but not be limited to, expenses of the following categories:
>
> (a) Program;
>
> (b) Management and general;
>
> (c) Fund-raising.

R.C. § 1716.04(A). These are narrow, objective, and definite requirements. While this section does allow for some discretion, since the attorney general may require a charitable organization to submit further information as part of its annual financial statement (R.C. § 1716.04(B)), that discretion is limited by the statutory requirement that the attorney general may require such information *by rule. Id.* (emphasis added). The attorney general, therefore, does not possess the unfettered discretion which would invalidate such a section. *See, City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 769-70 (1988) ("the face of the ordinance itself contains no explicit limits on the mayor's discretion. . . . the doctrine forbidding unbridled discretion . . . requires the limits . . . claim[ed] implicit in [the] law must be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice."). The registration requirements, contained in section 1716.04(A), are constitutional; plaintiffs' challenge to these sections does not state a claim upon which relief may be granted. Accordingly, defendants' motion to dismiss plaintiffs' challenge directed to this requirement is granted.[24]

The statute also requires the professional solicitor to file a solicitation notice before beginning any fundraising effort:

> (1) Prior to the commencement of any solicitation, the professional solicitor shall file all of the following with the attorney general:

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[24] This claim is a facial challenge, as it asserts legal arguments without supporting facts.

(a) A completed document called "Solicitation Notice" upon a form prescribed by the attorney general and containing all of the information specified in division (D)(2) of this section;

(b) A copy of the contract described in division (A) of section 1716.08 of the Revised Code;

(c) A sworn statement by the charitable organization on whose behalf the professional solicitor is acting certifying that the solicitation notice and any accompanying material are true and correct to the best of its knowledge.

(2) The solicitation notice shall include all of the following:

(a) The fund-raising methods to be used;

(b) The projected dates when the solicitation will commence and terminate;

(c) The location and telephone number from where the solicitation will be conducted if it will be conducted by telephone;

(d) The name and residence address of each person responsible for directing and supervising the conduct of the solicitation campaign;

(e) A statement of whether the professional solicitor will at any time have custody of any contributions;

(f) A full and fair description of the charitable program for which the solicitation campaign is being carried out;

(g) The written and signed consent of every charitable organization on whose behalf

> the professional solicitor will be soliciting contributions or whose name will be mentioned during the solicitation.

R.C. § 1716.07(D). With the exception of section (D)(2)(f), these mandates express narrow, objective and definite requirements. Therefore the notice of solicitation requirements, contained in section 1716.07(D), except subsection (D)(2)(f), are constitutional, and Plaintiffs' challenge to them does not state a claim upon which relief may be granted. Accordingly, the Court grants the State's motion to dismiss directed at this section of the statute.[25]

As indicated, plaintiffs' challenge to the subsection of the statute which requires the professional solicitor, prior to the start of any solicitation, to file with the attorney general "[a] full and fair description of the charitable program for which the solicitation is being carried out," R.C. § 1716.07(D) (2)(f), *does* state a claim upon which relief may be granted. Plaintiffs argue that this section is unconstitutional, as it vests the attorney general with unbridled discretion. Given the words "full and fair description," do not, at first glance, state narrow, objective, and definite requirements, plaintiffs' challenge states a claim upon which relief may be granted. Accordingly, the Court denies the state's motion to dismiss directed at this challenge.

Finally, the plaintiffs' challenge to the requirement that the professional solicitor's registration statement must contain "any other information that the attorney

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[25] This claim is a facial challenge, as it asserts legal arguments without supporting facts.

general may require," Ohio R.C. § 1716.07(B), also states a claim upon which relief may be granted. Such sweeping language, not modified by the requirement that the attorney general issue a uniform rule requesting information, does not contain narrow, objective, and definite standards which guide official discretion. Accordingly, the plaintiffs' challenge states a claim upon which relief can be granted. The state's motion to dismiss directed at this challenge is therefore denied.

The Court, for the reasons stated above, grants the state's motion to dismiss on the registration requirements, generally, except that the Court denies the state's motion to dismiss on two subsections of the registration requirements, to wit: the state's motion to dismiss is denied with respect to the subsections stating the requirement that the professional solicitor's registration statement must contain "any other information that the attorney general may require," R.C. § 1716.07(B), and that stating that the solicitor file "a full and fair description of the charitable program for which the solicitation is being carried out," R.C. § 1716.07(D)(2)(f).

(5) Registration Fees for Charitable Organizations and Professional Solicitors, Bond Requirements for Professional Solicitors

Three separate sections of the statute require charitable organizations and professional solicitors to pay registration fees and/or obtain a bond. The statute requires that every charitable organization which is required to register shall pay a fee according to a sliding scale. R.C. § 1716.02(D). The fee is fifty dollars if the contributions

total more than five thousand and less than twenty-five thousand dollars, the fee is one hundred dollars if the contributions total twenty-five thousand dollars or more and less than fifty thousand dollars, and the fee is two hundred dollars if the contributions total fifty thousand dollars or more. R.C. § 1716.02(D)(1). Charitable organizations receiving contributions of less than five thousand dollars are not required to pay a registration fee. R.C. § 1716.02(D)(2). Additionally, the statute requires that every professional solicitor register with the attorney general and pay a two hundred dollar registration fee. Corporations, partnerships, and associations which intend to act as professional solicitors are to include with their registration the names and addresses of all officers, employees, agents, and persons working under the direction of the professional solicitor. R.C. § 1716.07(B). Finally, at the time of making the application, the professional solicitor shall obtain a twenty-five thousand dollar bond and shall maintain the bond in effect as long as the registration is in effect. R.C. § 1717.07(C).

The constitutionality of registration fees turn on the nature of the activity registered and the extent of the fees involved. Charitable solicitation is protected speech. *Riley* at 789. Registration fees on constitutionally protected conduct are permissible if they are nominal and are imposed to defray the administrative costs involved in the registration. *Murdoch v. Commonwealth of Pennsylvania*, 319 U.S. 105, 113-14 (1943). The Court in *Murdoch* struck down the license fee because it was "not a nominal fee imposed as a regulatory measure to defray the expenses

of policing the activities in question." *Id.* at 113-14. Plaintiffs have alleged that the registration fees are not nominal and that they cover the expenses of administering an entire section of the attorney general's office. Such allegations state a claim upon which relief can be granted. Accordingly, the state's motion to dismiss directed at this claim is denied.[26]

The Court also denies the state's motion to dismiss directed at the plaintiffs' claim that the bonding requirement is unconstitutional. Plaintiffs have claimed that the fee to obtain a bond is excessive and does not meet *Murdoch's* requirements. Doc. 11 at 17. Such an allegation states a claim upon which relief may be granted; plaintiffs are entitled to attempt to show, at a subsequent hearing, that the bonding requirement demands payment of an excessive, not a nominal, fee.

(6) Financial Controls Concerning Bank Accounts

The statute requires that the contributions solicited be solely in the name of the charitable organization on whose behalf the money was solicited. R.C. § 1716.07(F). The statute also mandates that, within two days of receipt of the contribution, the solicitor deposit the entire amount of the contribution into an account controlled by the charitable organization and the professional solicitor shall not be given the authority to withdraw any deposited funds from the account. *Id.*

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[26] This claim is a facial challenge, as it asserts legal arguments without supporting facts.

Given that this is a facial challenge, and that in such a challenge the Court is concerned only with whether the statute is consistent with the constitution, and can be construed in a constitutional manner, *see Rust* at 1767, this challenge does not state a claim upon which relief can be granted. On its face, this component regulates the control of funds received and access to those funds once they are deposited; it does not implicate speech rights at all. This requirement, *at best*, has an ethereal impact on speech: solicitation limits are not set, rules are not established concerning how money may be spent, costs are not imposed; it is difficult to imagine how this regulation may affect the content or frequency of any speech. As a facial challenge, it does not state a claim upon which relief may be granted. The state's motion to dismiss is therefore granted with respect to this component of the statute, as embodied in R.C. § 1716.07(F).[27]

(7) The As-Applied Challenge – Statute Operates to Burden Speech

Plaintiffs allege that even if each of the components of the statute is facially valid, five of the seven components taken together operate to impermissibly burden the three plaintiffs' speech rights. The state has moved to dismiss, asserting that no claim is stated.

The state's motion to dismiss, directed at the as-applied claim, is denied. The allegation that a statute burdens speech, when preceded by facts showing means

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[27] This claim is a facial challenge, as it asserts legal arguments without supporting facts.

by which the statute has an impact on plaintiffs speech, states a claim for an as-applied challenge to the statute. After describing the filing fees, the restrictions on the bank account, and contracts between the professional solicitor and the charity, the amended complaint states, "for these and other reasons, the statute will make fund-raising and public communication more difficult than it previously has been and may lead to severe disruptions for DAVIP's [speech]." Doc. #11 at 6. Though not in the most lucid prose, this allegation does state an as-applied challenge to the statute. The state's motion to dismiss this claim is therefore denied.

Summarizing the discussion thus far, the Court has granted the State's motion to dismiss, Doc. #23, on the challenges to three components of the statute: (1) the point of solicitation disclosures, R.C. § 1716.08(B)(1) and (2); (2) with one exception, the registration requirement, R.C. § 1716.04(A), for charitable organizations, and, with one exception, the requirement that the professional solicitor file a solicitation notice, R.C. § 1716.07(D); and (3) the mandatory financial controls concerning bank accounts, R.C. § 1716.07(F). The Court has denied the motion to dismiss directed toward: (4) the required contractual clauses between solicitors and charitable organizations, R.C. § 1716.08(A); (5) the registration fees for charitable organizations, R.C. § 1716.02(D), and the registration fees, R.C. § 1716.07(B), and the bond requirement for professional solicitors, R.C. § 1716.07(C); (6) the requirement that professional solicitors shall limit speech regarding the use of donated tickets, R.C. § 1716.08(D); and (7) the as-applied challenge to the statute. Finally, the Court

denied the motion to dismiss with respect to the subsections stating that the professional solicitor's registration statement must contain "any other information that the attorney general may require," R.C. § 1716.07(B), and mandating that the solicitor file "a full and fair description of the charitable program for which the solicitation is being carried out," R.C. § 1716.07(D)(2)(f).

The Court now considers plaintiffs' motion for a preliminary injunction on those claims *not* addressed by the State's motion to dismiss. The Court then considers the claims which this Court has indicated have survived the state's motion to dismiss (those claims on which the state's motion to dismiss has been overruled).

III. Motion for a Preliminary Injunction (Doc. #3)

"[T]he purpose of a preliminary injunction, in contrast to one that is final, 'is merely to preserve the relative positions of the parties until a trial on the merits can be held.' " *Southern Milk Sales, Inc. v. Martin,* 924 F.2d 98, 102 (6th Cir.1991) (citation omitted); *Blount v. Societe Anonyme du Filtre Chamberland Systeme Pasteur,* 53 F. 98, 101 (6th Cir. 1892). To determine whether to issue a preliminary injunction, the Court weighs the following familiar factors:

> (1) Whether the party seeking the injunction has shown a substantial likelihood or probability of success on the merits;
>
> (2) Whether the party seeking the injunction will suffer irreparable harm absent the injunction;

> (3) Whether an injunction will cause others to suffer substantial harm; also known as the balancing of the equities between the parties (*i.e.*, the harm to the defendant if the motion is granted versus the harm to the plaintiff if the motion is denied), and
>
> (4) Whether the public interest would be served by a preliminary injunction.

Cincinnati Sub-Zero Products v. Augustine Medical, Inc., 800 F. Supp. 1549, 1557 (S.D. Ohio 1992). These factors identify considerations to be balanced, not prerequisites to be met. *In Re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir.1985). Nevertheless, according to Fed.R.Civ.P. 52, a Court must make specific findings concerning each of these four factors, unless fewer are dispositive. *United States v. School District of Ferndale*, 577 F.2d 1339, 1352 (6th Cir. 1978). Issuance of a preliminary injunction is appropriate "where the plaintiff fails to show a strong or substantial probability of ultimate success on the merits of his claim, but where he at least shows serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to defendant if an injunction is issued." *In re DeLorean*, 755 F.2d at 1229 (citation omitted). No single factor compels the issuance of a preliminary injunction, *Id.*, yet a failure to demonstrate the existence of irreparable injury absent a preliminary injunction can be fatal to a motion for such an order. *See, e.g., Southern Milk Sales*, 924 F.2d at 103. At the preliminary injunction stage, the Court is not required to resolve "doubtful or difficult questions of law or disputed questions of fact." *International Molders' and Allied Workers' Local U. v. Nelson*, 799 F.2d 547, 551 (9th Cir. 1986).

1. *Substantial Likelihood or Probability of Success on the Merits*

A. *Challenges to the Statute Not Addressed by the Motion to Dismiss*

Plaintiffs make five facial challenges to the entire statute, four of which remain before the Court on the motion for a preliminary injunction, as they were not addressed by the state's motion to dismiss.[28] Doc. #5 at 21. The statute, according to the plaintiffs, unconstitutionally: (1) discriminates against small and unpopular charities that rely on professional fund-raisers, (2) exempts religious organizations, (3) lacks procedural safeguards, and (4) creates vague penalty provisions. Doc. #5 at 26-34, 53-66. Also pending before the Court are two remaining challenges to individual sections of the statute, not addressed by the motion to dismiss, namely, that: (5) the prohibition on felons and those convicted of violations of Ohio's charitable solicitation law are prohibited from employment as professional solicitors for a period of five years following the date of their conviction, and (6) that the regulations regarding the solicitation of funds for distributing information about missing children, are both unconstitutional.

While legislative regulation of charitable solicitation implicates the first amendment, *Riley v. National Fed'n of*

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[28] The facial challenge to the registration and notice of solicitation requirements was addressed by the state's motion to dismiss. The Court granted the state's motion to dismiss as directed to the registration and notice of solicitation requirements, except a portion of § 1716.07(B) and § 1716.07(D)(2)(f). *See supra*, at 32-37.

the Blind, 487 U.S. 781 (1988), *Secretary of State v. Joseph H. Munson, Co.*, 467 U.S. 947 (1984), *Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), the Court, contrary to plaintiffs' arguments, does not understand that *every* challenged feature of this statute must be evaluated under strict scrutiny or under a similarly rigorous first amendment standard. " 'Speaker-partial' regulations, or those that purportedly favor one group of speakers at the expense of others, similarly are not subject to strict scrutiny unless they are content-based." *Turner Broadcasting System, Inc. v. FCC*, 819 F. Supp. 32, 42 (D.D.C. 1993) (three-judge court). The constitutional scrutiny the Court applies to plaintiffs' challenges to the statute will vary in accord with the substance of their claims.

(1) Differential treatment of shall and unpopular charities

The statute itself exempts any religious organization and any charity "operated, supervised, or controlled" by a religious organization from registering and filing a financial report with the attorney general. R.C. § 1716.03(A). Likewise, the statute exempts educational institutions which restrict their solicitation to alumni, faculty, students, or trustees, and those groups which confine solicitations to existing members, and current or past employees and trustees. R.C. § 1716.03(C) and (D). The statute further exempts any charitable organization which fulfills each of the following conditions: has been in continuous existence within Ohio for more than two years, is exempt from federal income taxation under

501(c)(3) of the Internal Revenue Code, and is registered with, paid a fee, and submitted an annual report to the attorney general pursuant to Ohio R.C. § 109.26 and 109.31.[29] Ohio R.C. § 1716.03(B). Plaintiffs allege that these distinctions unconstitutionally differentiate between "small, unpopular, or unaffiliated charities which must use outside professional fund-raisers and the established ones with inside professional fund-raisers." Doc. #29 at 16. The Court reviews this claim under the rational basis[30] test, examining whether "there is any

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[29] These statutes require that every charitable trust register with the attorney general of Ohio, that each trust so registered must file an annual report or file a copy of its federal income tax return, in lieu of preparing an annual report, and that each trust pay a filing fee which increases with its assets. Ohio R.C. §§ 109.26, 109.31, respectively. Charitable trusts with exclusively religious purposes, educational institutions with a regular faculty and student body, and trusts with gross receipts of less than five thousand dollars and assets of less than fifteen thousand dollars are exempt from filing annual reports with the attorney general. Ohio R.C. § 109.31 (Anderson Supp. 1993).

[30] Plaintiff's contention that this section of the statute should be subject to strict scrutiny is without merit. The differentiation between large and small charities, without more neither implicates a fundamental right nor turns on a suspect classification. Rational basis is therefore the appropriate standard of review. *Gregory v. Ashcroft*, 111 S.Ct. 2395, 2406 (1991).

Of course, had Plaintiffs demonstrated, in the as-applied challenge, that the statute did significantly burden first amendment rights, then the Court would have viewed the differentiation between charities as implicating a fundamental right and would have intensified the degree of scrutiny. Specifically, if Plaintiffs ultimately prevail on this as-applied challenge, namely, that the statute impermissibly burdens their speech rights, they may be able to reassert this equal protection challenge to the differentiation between large and small charities

reasonably conceivable state of facts that could provide a rational basis for the classification," *FCC v. Beach Communications*, 113 S.Ct. 2096, 2101 (1993).

Under the rational basis test, the Court concludes that there is a "reasonably conceivable state of facts which could provide" a basis for the differentiation between charities. *Beach Communications* at 2101. While the record makes clear that the statute differentiates between larger and smaller charities, thereby exempting large numbers[31] of charities from the statute, the differing degrees of regulation rest on several rational grounds.

The differentiation created by the exemption is consistent with the legislature's goals. Given the legislature's concern about fraud,[32] the statute's focus on smaller, less

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and argue that they are entitled to a greater than rational basis review, as the differentiation in the statute implicates a fundamental right.

[31] Plaintiffs claim that "nearly two-thirds" of Ohio's charities are exempt from the statute. Doc. #5 at 18. The attorney general's memorandum indicates that "the vast majority" of Ohio's charitable organizations are exempt from the statute. Doc. #5, Ex. B at 5 (misidentified as Ex. A).

[32] The attorney general prepared a memorandum in support of House Bill 486 which enacted the regulations of professional solicitors at issue herein. The memorandum noted that the attorney general

> believes Ohio needs to take a stronger stand against those who use deceit and fraud to take advantage of our good intentions. Increasing incidents of fraud among some members of the charitable fund-raising industry devalues the spirit in which those contributions were made and causes a chilling effect on charitable giving. As more and more scams are reported to

established charities which may lack the experience, sophistication and/or institutional structure to supervise professional fund-raisers is consistent with the effort to control fraud. Likewise, the statute's focus' on charities which lack ongoing ties to their targeted contributors, and therefore whose contributors may have little incentive to detect and/or report questionable fundraising practices, is also consistent with efforts to control fraud. The exemption for educational institutions which do not solicit from the public is consistent with the view that fraud is more likely when members of the public, unfamiliar with the charity, are targets of the fundraising effort, than when the solicitation targets an internal constituency or another group familiar with the organization. One of the justifications for the religious exemption also rests on this view of fraud – fraud is less likely in a religious solicitation context as many of those groups solicit from members or congregants or those otherwise aware of their programs. For the reasons stated above, the differentiations contained in the statute – between large and small charities, between secular and religious charities, between charities which fundraise from internal constituencies and charities which fundraise from the public – are constitutional on their face. Plaintiffs, consequently, do not have a substantial likelihood of success on this facial challenge to the statute.

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the public, citizens are reluctant to give, and legitimate charities will suffer.

Doc. #5, Ex. B at 1 (misidentified as Ex. A).

(2) The Religious Exemption

Plaintiffs argue that the statute unconstitutionally discriminates against secular charities by providing a blanket exemption for religious organizations and charities "operated, supervised or controlled," Ohio R.C. § 1716.03(A), by a religious organization. Specifically, Plaintiffs allege that the exemption violates "the establishment clause and principles of free speech and equal protection." Doc. #11 at ¶ 37(g).

With regard to the establishment clause claim, none of the three plaintiffs have demonstrated the requisite taxpayer status to have standing to assert this claim. *School District of Grand Rapids v. Ball*, 473 U.S. 373, 380 n.5 (1985). However, such a lack of standing has no bearing on the merits of the claim, since the Court considers the core of an establishment clause claim in its consideration of the equal protection claim. *See infra* at 47-50.

The claim that the religious exemption violates constitutional guarantees of free speech fails. The exemption "serves purposes unrelated to the content [of the organizations' speech and] is deemed [content-]neutral even it has an incidental effect on some speakers and messages but not others." *Bamon Corp. v. City of Dayton*, 923 F.2d 470, 473 (6th Cir. 1991).

With respect to the equal protection challenge to the statute, "[L]aws discriminating *among* religions are subject to strict scrutiny . . . and . . . laws 'affording a uniform benefit to *all* religions' should be analyzed under *Lemon*." *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327,

338-39 (1987) (emphasis in original, ellipses added, citation omitted). The statute herein does not discriminate among religions, but applies to all religions. Therefore, the Court examines whether the statute passes the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *Presiding Bishop* at 338-39. If the statute passes the *Lemon* test, the Court then examines if the exemption constitutes "a rational classification to further a legitimate [governmental] end." *Presiding Bishop* at 339 ("where a statute is neutral on its face and motivated by a permissible purpose of limiting governmental interference with the exercise of religion, we see no justification for applying strict scrutiny.").[33]

The Court now evaluates the statute under the familiar, three part test set forth in *Lemon*: whether the statute has a secular legislative purpose, whether the statute's primary effect neither advances nor inhibits religion, and whether the statute fosters an excessive governmental

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[33] Plaintiffs, relying on *Texas Monthly v. Bullock*, 489 U.S. 1 (1989), argue that exemptions for religious organizations violate the establishment clause. As a doctrinal matter, such an assertion may have validity. However, here there is an exemption which applies to religious and secular charitable organizations, a situation not present in *Texas Monthly* which turned on a statute which exempted religious periodicals, and no secular periodicals, from the state sales tax. The *Texas Monthly* decision is distinguishable. *Walz v. Tax Comm'n of New York City*, 397 U.S. 664 (1970) is on point. In *Walz*, the Supreme Court upheld, against an establishment clause challenge, a property tax exemption which applied to properties owned by religious organizations as well as to real estate owned by secular charities. As the exemption applied to secular groups, it was constitutional, even though religious groups benefited substantially from the statute.

entanglement with religion. *Lemon*, 403 U.S. at 612-613. The Court is satisfied that the statute, as well as the religious exemption, has a secular legislative purpose. The statute itself was enacted "against those who use deceit and fraud to take advantage of [Ohio citizens'] good intentions" and to counteract the "increasing incidents of fraud among some members of the charitable and fundraising industry." Doc. #5, Ex. B at 1 (misidentified as Ex. A). The exemption for religious organizations saves such organizations, or charities controlled by them, from being obligated to file a registration statement describing the structure, activities and finances of the organization with the attorney general, thereby avoiding state entanglement with religion.[34] *Id.* at 3-4.

The statute neither advances nor inhibits religion. As many secular organizations are exempt from the statute, the statutory exemption does not advance religious interests. Nor does the exemption burden religion: no religious organization is required to follow *more* procedures as a result of being exempt from the statute. Finally, the Court is satisfied that the statute does not foster an excessive entanglement with religion. The exemption operates to distance government from knowledge of or involvement with the inner workings of religious organizations and demonstrates sensitivity to establishment clause values. The Court concludes that the statute survives the Lemon test.

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[34] Four other categories of organizations are also exempt from the statute. R.C. § 1716.03 (B), (C), (D) and (E); *see also, supra* at 45-48.

The Court now examines if the exemption constitutes a rational classification to further a legitimate governmental end. As the exemption avoids excessive entanglement with religion, the Court concludes that the exemption is rational and furthers a legitimate governmental interest. The exemption is also consistent with the legislature's judgment that established organizations are less likely to commit fraud than those which are less established. While there may not be a precise overlap between these two sets of entities – less established organizations and those organizations likely to commit, or be blind to, the commission of fraud the Court is satisfied that the legislative judgment that there *is* overlap is rational and related to the ends of eliminating fraud, protecting the donating public, and insuring the efficiency and reputation of the fundraising sector. As the religious exemption is constitutional, plaintiffs do not have a substantial likelihood of success on this claim.

(3) Allegedly Inadequate Procedural Safeguards

Plaintiffs claim that by failing to establish a time period within which the attorney general must deem the registration and notice of solicitation materials complete or deficient, the statute permits an indefinite prohibition on plaintiffs' ability to solicit funds and therefore violates the first amendment. Doc. #5 at 60-62.

While it is well established that a licensing scheme affecting speech which permits "unbridled discretion in the hands of a governmental official or agency" or which "fails to place limits on the time within which the decisionmaker must issue the license" violates the first

amendment, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225-26 (1990), it is by no means clear that the statute before the Court constitutes such a licensing scheme.[35]

The statute requires that certain information be provided to the attorney general and does not permit that official to evaluate that information or condition any benefit on its adequacy. The registration requirements contained in R.C. § 1716.02 employ no discretionary language. The organizations to which the statute applies are directed to submit certain documents and information to the attorney general ("[e]very charitable organization . . . shall file a registration statement. . . . the registration statement shall contain the following information"). R.C. § 1716.02(A). The statute does not empower the attorney general to issue a license, permit, or otherwise authorize the charitable organization to conduct its activities. Nor does the statute require, empower, authorize or permit a public official or agency to evaluate or judge the material submitted in order to arrive at a subsequent decision about the charitable organization which submitted the form. The attorney general must provide a form upon which the charitable organizations complete their registration statement (R.C. § 1716.02(A)), and if the attorney general wishes information other than that specified by statute, the attorney general must request that information "by rule." R.C. § 1716.02(B)(15).

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[35] Plaintiffs' reliance on *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976), to show that registration requirements, as such, vest the state with the power to prohibit protected expression, is unavailing. The Court held that the statute at issue was unconstitutional because it was vague, not because it created registration requirements. *Id.* at 620-22.

As the statute provides for no discretion, and as the attorney general does not need to reach a decision about the materials submitted, there is no reason for the statute to define a time period within which the attorney general must reach a decision.

The same analysis applies to the statute's requirement that the charitable organization file an annual financial report and that the professional solicitor file a solicitation notice. With respect to the financial report requirement, the statute requires the attorney general to develop a form upon which the information is to be filed, requires him to accept a duplicate of annual financial report or tax form filed with the IRS, and permits him to request additional information "by rule." R.C. § 1716.04(B). Likewise, the requirement that the professional solicitor file a solicitation notice gives no discretionary power to the attorney general, other than requiring that official to draw up a form that the professional solicitor is to complete. R.C. § 1716.07(D). These sections of the statute require nothing from the attorney general other than ministerial actions. Judgment, discretion, evaluation are neither required nor permitted; there is no issuing, or withholding, of permits, licenses, approvals and authorizations based on the exercise of any judgment, discretion, or evaluation.

The attorney general's letters to charitable organizations (Doc. #19, Ex. B), introduced by plaintiffs to demonstrate that the statute functions as an impermissible

licensing scheme, are not to the contrary.[36] These letters show the attorney general notifying the charitable organizations that they have not complied with the statute, as they have not submitted four of the required documents. The letters also state the penalties imposed by statute for failing to register. *Id.* The only "discretion" involves the attorney general's conclusions that "You have not submitted [a list of four documents]. . . . YOU ARE NOT REGISTERED to conduct charitable solicitations in Ohio until such time as you have submitted the complete registration forms including all items noted above." *Id.* The Court is unable to conclude that this letter is anything more than a clerical notification that the required forms have not been received. The letter itself indicates that registration is self-executing once the necessary forms have been provided: "you are not registered . . . until such time as you have submitted the completed registration forms." *Id.* The Supreme Court recognized that under certain circumstances, registration can be a self-executing act. *Riley* at 801 ("volunteer fundraisers . . . may solicit immediately upon submitting an application.") This statute lacks the "very existence of official discretion that gives rise to a threat of injury sufficient to warrant an injunction." *Miami Herald Publishing Co. v. City of Hallandale,* 734 F.2d 666, 674 n. 4 (11th Cir. 1984). The statute conforms to the rigorous requirements for licensing of

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[36] The Court is aware that "facial attacks, by their nature, are not dependent on the facts surrounding any particular permit denial." *City of Lakewood,* 486 U.S. at 770 n.11. The Court mentions the facts introduced by the plaintiffs only because they indicate that the prohibited discretion is absent.

first amendment activity which inhere in a half century of Supreme Court precedent:

> the standards must be more than mere criteria or guidelines; they must be complete in and of themselves, and leave no factors to be assessed, judgments to be made, or discretion to be exercised by the appropriate licensing official. In other words, *the decision to grant or deny the license application must be virtually a ministerial one.*

Swearson v. Meyers, 455 F. Supp. 88, 91 (D.Kan. 1978). The statute does not provide any state official with discretionary power, or with the ability to assess or judge information. The only necessary step to comply with the statute is to submit the required information. The procedural safeguards contained in the statute are therefore consistent with the first amendment. Plaintiffs do not have a substantial likelihood of succeeding on the merits of their challenge to the statute on the basis that it lacks essential procedural safeguards.

(4) Allegedly Inadequate Penalty Provisions

Plaintiffs claim that the penalty provisions are unconstitutionally vague. Doc. #5 at 62-66. Plaintiffs do not challenge the penalty provisions *themselves*, rather they argue that sections of the statute, the violation of which is defined as solicitation fraud by the penalty section, are impermissibly vague criminal statutes. Specifically, Plaintiffs claim that the statute's command that fines and bond forfeitures be credited to a charitable foundations fund, R.C. § 1716.16(E), as well as its failure to include scienter

as an element in the offenses it delineates, R.C. § 1716.16, render sections of the statute unconstitutional. Doc. #5 at 63-66.

The requirement that fines and bond forfeitures be paid into the state treasury "to the credit of the charitable foundations fund" is constitutional. While the office of the attorney general receives benefits from the charitable foundations fund (R.C. § 109.32), and while the attorney general, according to the plaintiffs, "often acts as the sole enforcer of the statute" (Doc. #5 at 64 n.10), the attorney general does not impose the fines, and does not act in a judicial capacity. Unlike *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), where the mayor imposed fines *and* was charged with supervising the town's finances, and consequently had an interest in imposing steep fines, the fines and forfeitures here are *sought* by the attorney general and *imposed* by an independent judicial body. This institutional arrangement, consisting of a division between the judicial and executive functions, is compatible with due process. Therefore, plaintiffs do not have a substantial likelihood of succeeding on the merits of this portion of their claim.

Plaintiffs' claim that the prohibited acts and practices section of the statute is unconstitutional turns on whether, in the absence of a scienter requirement, the statute's definition of those prohibited acts "give[s] a person of ordinary intelligence fair notice that his contemplated conduct is forbidden," *United States v. Harriss*, 347 U.S. 612, 617 (1954), consistent with the realization that "condemned to the use of words, we can never expect mathematical certainty from our language." *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972).

The Court concludes that the statute is sufficiently clear to pass constitutional muster, even without an explicit scienter requirement. As an initial point, the Court notes that there is no blanket requirement that criminal statutes explicitly state a *mens rea* element: Ohio criminal misdemeanor statutes prohibiting gambling[37], endangering children[38], and failing to comply with an order of a police officer[39] each lack such an element. Such an absence of *mens rea* violates no constitutional principle. In a different context, the Supreme Court noted that similar offenses

> impair the efficiency of controls deemed essential to the social order as presently constituted. In this respect, whatever the intent of the violator, the injury is the same, and the consequences are injurious or not according to fortuity. Hence, legislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element. The accused, if he does not will the violation, usually is in a position to prevent

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[37] "No person shall do any of the following: engage in bookmaking . . . engage in betting or in playing any scheme or game of chance . . . as a substantial source of income or livelihood." R.C. § 2915.02.

[38] "No person, who is the parent, guardian, custodian, person having custody or control, or person in loco parentis of a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age, shall create a substantial risk to the health or safety of the child." R.C. § 2919.22(A).

[39] "No person shall fail to comply with any lawful order or direction of any police officer invested with authority to direct, control, or regulate traffic." R.C. § 2921.331(A).

> it with no more care than society might reasonably expect, and no more exertion than it might reasonably exact from one who assumed his responsibility.

Morissette v. United States, 342 U.S. 246, 255-56 (1952). The Seventh Circuit noted: "the power of the legislature to declare an offense, and to exclude the elements of knowledge and due diligence from any inquiry as to its commission, cannot, we think, be questioned. Similarly, '[t]he objection that punishment of a person for an act as a crime when ignorant of the facts making it so, involves a denial of due process of law has more than once been overruled.' " *Stepniewski v. Gagnon*, 732 F.2d 567, 572 (7th Cir. 1984) (citations omitted). Finally, when a criminal statute is silent regarding the requisite culpable mental state, Ohio law reads into the statute a *mens rea* of recklessness. R.C. § 2901.21(B). These principles indicate that the lack of a *mens rea* requirement does not affect the constitutionality of the statute.[40]

Plaintiffs have not carried their burden of persuasion that the penalty portions of the statute are vague and therefore constitutionally flawed. Plaintiffs make the conclusory assertion that the eleven prohibited acts and practices, set forth in R.C. § 1716.14(A), "are stated in vague terms," Doc. #5 at 63, but fail to analyze each of the allegedly vague provisions to demonstrate how the words are susceptible of two or more interpretations.

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[40] This conclusion is buttressed by courts' willingness to presume the requirement of mens rea absent a contrary legislative intent. *United States v. Harris*, 959 F.2d 246, 258 (D.C. Cir.), *cert. denied*, 113 S.Ct. 362 (1992).

Instead, plaintiffs focus on but three sections: the prohibitions against "committing any unfair or deceptive act or practice," R.C. § 1716.14(A)(2); "operating in violation of, or failing to comply with, any of the requirements of this chapter," R.C. § 1716.14(A)(1); and "[u]sing or exploiting the fact of registration in such a manner as to lead any person to believe that the registration in any manner constitutes an endorsement or approval by the state," R.C. § 1716.14(a)(7).

These three sections are constitutional. As the Supreme Court noted, "there are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with." *United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 578-79 (1973). The Court finds that the above-mentioned allegedly vague sections of the statute contain language which is capable of being understood by the ordinary person using ordinary common sense.[41] Accordingly, Plaintiffs do not have a substantial likelihood of success on this claim.

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[41] The claim that the phrase, "unfair and deceptive acts or practices," is impermissibly vague is particularly ill-taken, in that those terms are defined in R.C. § 1345.02.

(5) Ban on Employment of Felons as Professional Solicitors

The statute prohibits persons who have been convicted of a felony or a violation of Ohio's charitable solicitation law from serving as a professional solicitor or as a member, officer, employee or agent of a professional solicitor for five years following the date of conviction. R.C. § 1716.07(I).

The statute prevents those to whom it applies from working as, or serving as a key individual in a professional solicitation organization and, therefore, burdens such individuals' first amendment rights. However, if the statute serves the state's interests in preventing fraud, it also "may bear some relation to public safety," *Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620, 638 (1980), as it reduces felons' routine, employment-based contact, either in person or on the telephone, with persons in their homes. Moreover, the burden is narrowly tailored to serve the state's interests. The burden is not a ban: such individuals can still serve as volunteer solicitors for any organization with which they wish to identify themselves. The organizations for which these individuals volunteer are not harmed by such links; no sanctions are imposed by granting such individuals permission to work as volunteers. The burden is limited in time: once five years pass, the statutory restrictions are lifted. These modified, rather than total, burdens – restrictions in time and a focus on professional or significant volunteer involvement – distinguish the statute from the outright ban on *any* first amendment charitable solicitation activity by convicted felons which was struck

down in *Fernandes v. Limmer*, 663 F.2d 619, 629-30 (5th Cir. Unit A 1981), *cert. dismissed*, 458 U.S. 1124 (1982). The prohibition on the involvement of persons convicted of particular crimes serves the significant government interest in deterring fraud, and furthering public safety, is narrowly drawn, both regarding the individuals affected and the organizations with whom they may work, and leaves ample alternatives for protected speech available to the individuals themselves and to the charities for which they may volunteer. Plaintiffs do not have a substantial likelihood of success on this claim.

(6) Regulation of Solicitations on Behalf of Missing Children

The statute also requires that charities soliciting contributions for the purpose of distributing materials relating to missing children shall be incorporated for two years prior to the time of solicitation, shall be exempt from federal income taxation for a period of two years prior to the time of solicitation, shall not use fund-raising counsel, professional solicitors, or commercial co-venturers in the solicitation of funds, and shall not state or imply that it is affiliated with an organization that assists in the location of missing children without the express written consent of that organization. R.C. § 2901.32(A) and (B).

These sections of the statute substantially burden protected speech. They limit the solicitation opportunities and hence the speech of those who wish to solicit funds for a single topic – the location of missing children. The restrictions come into play only if the speaker addresses

one identified topic. This is a content-based regulation of speech. *Ward v. Rock Against Racism,* 491 U.S. at 791. As such, it can only be upheld if it is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. *Boos v. Barry,* 485 U.S. at 321.

The state attempts to justify this restriction on speech by claiming that the interest in caring for its minor citizens and in locating missing children are compelling interests. Doc. #15 at 67-72. The state's argument misses the point: there must be a compelling state interest in *restricting* the speech, not in the topic the speaker wishes to discuss, generally. To accept the state's argument would be to turn the first amendment on its head, permitting government regulation of any topic the government had a compelling interest in – the national defense, caring for those with AIDS, insuring adequate pre-natal care, or guaranteeing this nation's economic prosperity. The state's legal argument is but a diversionary tactic; while Ohio does have an interest in its children, it has no interest in restricting speech concerning its children who are missing. Accordingly, plaintiffs have a substantial likelihood of success on their claim that this section of the statute violates the first amendment.

B. Challenges which Survived the Motion to Dismiss (Challenges upon which the Court overruled the Motion to Dismiss)[42]

(1) Required Contractual Clauses for Professional Solicitators

Plaintiffs argue that the requirement that certain clauses – be inserted into contracts between professional solicitors and charitable organizations violates the principles laid down in *Riley*. While this argument states a claim upon which relief may be granted, plaintiffs do not have a substantial likelihood of success on the merits of this challenge to a component of the statute.

The argument is anchored in its reliance on *Riley*. Reliance on that decision is inapposite, hence plaintiffs' challenge to the requirement that contracts must contain certain clauses, fails. *First*, *Riley* did not hold that *any* regulation of a professional solicitor's fees was unconstitutional; *Riley* expressed the narrower proposition that the regulation of fees which impermissibly burdens speech is unconstitutional. *Second*, the Court's legal conclusion in *Riley* – that North Carolina's statute impermissibly burdened charities' speech – rested on its prior finding that the statute operated like the statutes in *Schaumberg* and *Munson*, "restrict[ing] First Amendment

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[42] Since the Court concluded that three of plaintiffs' challenges to the statute did not state claims upon which relief could be granted (did not survive the motion to dismiss), *see supra* at 41, there is no need to consider these claims at the preliminary injunction stage, when the Court evaluates whether the Plaintiffs' challenges to the statute have a substantial likelihood of success on the merits.

activity that results in high costs but itself is a part of the charity's goal or that is simply attributable to the fact that the charity's cause proves . . . unpopular." *Riley* at 789. There has been no showing that particular charities, or types of charities, are impacted by the requirement that their contracts take a certain form. *Finally,* the Court found that the North Carolina statute dictated the level of fee a charity could pay to its fundraiser. The statute at issue herein simply requires that the fees be described in one of two manners; there is no effort to mandate the proper level of fee or to set forth a presumptively impermissible fee. Plaintiffs rely on *Riley* to show that the statute herein, regulating the *form* of their contracts, shapes the substance of the speech and thereby burdens their rights. But the fact that North Carolina's statute, described in *Riley,* effected [sic] speech, does not indicate that Ohio's statute, with different provisions, described herein, also effects [sic] speech. As the regulations do not affect protected speech, they do not violate the first amendment as interpreted in *Riley.* The Court also notes that the regulations are narrowly tailored to further the State's interest in monitoring the fiscal affairs of charitable organizations to deter fraud. These regulations are constitutional; plaintiffs do not have a substantial likelihood of success on their challenge to the constitutionality of subsections 1716.08(A) and (C) of the statute.

(2) Registration Fees for Charitable Organizations and Professional Solicitors. Bond Requirements for Professional Solicitors

The registration fees for professional solicitors and charitable organizations are consistent with first

amendment principles; plaintiffs' challenge to those fees, while stating a claim, does not have a substantial likelihood of success on the merits.

The Court in *Murdoch v. Commonwealth of Pennsylvania*, 319 U.S. 105, 113-14 (1943) struck down the license fee because it was "not a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question." *Id.* at 113-14. More recently, in *Stonewall Union v. City of Columbus*, 931 F.2d 1130 (6th Cir.), *cert. denied*, 112 S.Ct. 275 (1991), the appellate court upheld a municipal ordinance requiring the payment of eighty-five dollars as a fee for a parade permit and an additional fee of $672.50 for traffic control services. The fees were constitutional because they were "designed to meet the expenses incident to the administration of the law and the cost of maintaining public order for the parade." *Id.* at 1133.[43] The fees in the statute at issue meet the test set forth in *Murdoch*, 319 U.S. at 113-14, and

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[43] The Supreme Court's ruling in *Forsyth County*, 112 S.Ct. at 2403, that "reaction to speech is not a content-neutral basis for regulation," casts doubt on the Sixth's Circuit's view that enforcement costs were permissibly factored into the fees charged by Columbus. However, the Supreme Court's analysis turned on the potential for arbitrariness in calculating fees and on the relationship between enforcement and listener reaction, two constitutionally prohibited features of any fee scheme. These features are *not* present in the Ohio statute challenged herein: the fees are established by the legislature at three precise levels, $50, $100, and $200, according to the amount of annual contributions; the fees do not vary with the content of or potential reaction to the registrant's speech. The ruling in *Forsyth County*, therefore, does not effect [sic] the constitutionality of Ohio's fee structure, and is consistent with *Murdoch's* holding that fees can defray the costs of "policing."

Stonewall Union, 931 F.2d at 1133, that such charges are permitted under the first amendment so long as they are nominal and are designed to meet or defray administrative costs. *First*, the level of fees, $50, $100, and $200, are nominal, especially since they are based on the revenue of the charitable organization. *Second*, they are related to the costs of administering the charitable solicitation statute. The state identified the cost of additional staff positions necessary to administer and enforce the statute, $272,909.99,[44] and estimated the revenue that the fees are likely to generate, $120,000. Doc. #30 at 16. These admittedly preliminary figures show that the current fee structure is not even meeting the costs of administering and enforcing its statute. The fees established are well within the rule established in *Murdoch* and *Stonewall Union* – that user fees are permitted to cover the expenses incident to the administration of law and the costs of maintaining public order.

Plaintiffs argue strenuously that the fees may cover the expense of administering the registration scheme itself, not ongoing enforcement of the law. Doc. #29 at 31-32. Plaintiffs' argument is answered by Sixth Circuit precedent. The user fee held constitutional in *Stonewall Union*, calculated to cover the cost of police personnel and vehicles, *id.* at 1132 n. 1, suggests that some limited

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[44] The state emphasized that this figured included only the *personnel* costs of administration and enforcement, and did not include other than personnel services. Doc. #30 at 15-16. The true cost of administering and enforcing the statute is higher than the figure provided by the state. *Id.*

enforcement costs may be factored in to [sic] the calculation of the fee level, so long as such costs do not constitute an "accountant's veto" of protected first amendment rights. *See also, National Awareness Foundation v. Abrams*, 812 F. Supp. 431, 434 (S.D.N.Y. 1993) ("if New York establishes a reasonable connection between the $80 fee for professional solicitors and the particular administrative *and enforcement* costs each year associated with its regulation of those fund-raisers, the fee would not represent an unconstitutional prior restraint on plaintiffs 1st amendment rights.") (emphasis added). The registration fee requirements at issue herein are constitutional. Hence, plaintiffs do not have a substantial likelihood of success on their challenge to such fees.[45]

The requirement that a professional solicitor post a bond is also consistent with first amendment principles. In this case, the cost of the bond, between $250 and $375 annually, Doc. #30 at 21, is nominal, especially considering that the state is requiring the bond of profit-making entities.

This section of the statute does not affect protected speech. This nominal cost poses only the most infinitesimal of burdens on professional solicitor's first amendment rights. Because protected rights are affected only in the most gossamer manner imaginable, and since the

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[45] This claim is one of the few facial claims that requires a Court to consider some limited facts. Without understanding the facts behind the statute, specifically the level of fees and the costs of administration of the statute, it would be impossible for the Court even to consider a facial challenge to a statute which imposes a fee.

bond requirement deters fraud, facilitates the recovery of funds lost or stolen by the professional solicitor, and is narrowly drawn to serve these state interests, the Court concludes that the required bond is a regulation of speech well within the first amendment. *See Heritage Publishing Co. v. Fishman*, 634 F. Supp. 1489, 1502 (D. Minn.1986) (upholding a requirement that professional fundraisers post a $20,000 bond.). Hence, the Court concludes that plaintiffs do not have a substantial likelihood of success on this claim.

(3) The As-Applied Challenge

The plaintiffs also claim that five of the seven challenged components of the statute, even if facially valid individually, operate together as an impermissible burden on plaintiffs' speech: the "registration and other similar requirements are overly burdensome." Doc. #5 at 30. While this challenge does state a claim upon which relief may be granted, plaintiffs have not shown a substantial likelihood of success on the merits of this claim and, therefore, the Court denies the motion for a preliminary injunction directed at such a claim.

The record, as developed through deposition testimony and during the hearing on the motion for the preliminary injunction, is unclear concerning the actual burdens of complying with five of the seven challenged components of the statute. Plaintiffs claim the burdens of registering and filing the required financial documentation with the attorney general are substantial. Winkowski Dep. at 14, 98; Johnson Dep. at 32.

The record has not established that the costs of compliance with this statute are "substantial" or "onerous," *i.e.*, that the statute operates to restrict first amendment rights. The chair of FPN testified that they do not have the time or expertise to comply with many of the challenged provisions, and would prefer that the solicitor handle all financial transactions. Winkowski Dep. at 15, 17. These statements, however, do not establish that their first amendment rights will be restricted, especially since she later testifies that the organization will "complete a registration form," *Id.* at 21, and will file tax reports with the IRS, *Id.* at 90. Such statements merely indicate that FPN is unhappy about having to comply with the statute, not that the statute will restrict that organizations first amendment rights.

While all government regulation poses compliance costs, the evidence has not shown that compliance will restrict speech opportunities. The record has demonstrated merely that the challenged statute requires more detailed information from the charitable organizations to which it applies than does the comparable statute which applies to exempted charities. The exempted charities are required to submit an annual report by completing a one-page questionnaire (Doc. #19 at Ex.B), or a federal tax return in lieu of same; the smaller charities are required to submit an annual financial report which must include a balance sheet, a statement of support, revenue, and expenses, and changes in the fund balance, a statement of expenses divided into categories of program, management and general, and fundraising. *Compare* Ohio R.C. §§ 129.26 and 129.31 with R.C. § 1716.04(A). The smaller charities must fill out their annual report with only the

words of the statute as a guide, as no form has been prepared to facilitate compliance. Doc. #29 at 15. While the statute further provides that the attorney general "may require additional information as part of the annual financial report," the statute also enables smaller charities to submit a copy of its federal tax return in lieu of an annual report. Ohio R.C. § 1716.04(B). These burdens, unpleasant though they may be, do not establish that speech rights will be diminished as a result of the statute. Because plaintiffs have not carried their burden of proving the onerous nature of compliance with five of the seven components of the statute, the Court concludes that at [sic] the plaintiffs have not shown that they have a substantial likelihood of success on the merits of their as-applied claim.

(4) Limitations on Speech Concerning Distribution of Donated Tickets

The Court previously determined that plaintiffs' challenge to the component of the statute which mandated what the solicitor may say about the ticket distribution, R.C. § 1716.08(D), stated a claim upon which relief could be granted. The Court observed that the requirement was not content neutral and therefore had to be "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end." *Boos v. Barry*, 485 U.S. 312, 321 (1988). The Court now determines that the plaintiffs have a substantial likelihood of success on this claim.

The state identifies two possible compelling interests that the statute serves: the need for "professional solicitors to have a charitable beneficiary in mind [for the tickets] before conducting a solicitation" and charitable organizations' need for substantial notice to determine whether they will be able to use the donated tickets. Doc. #30 at 31. While these goals are no doubt laudable, there [sic] are not the type of compelling interests which could justify the content-based restriction on a solicitor's speech.

Even if they were the type of substantial government interest which could justify a content-based restriction, the statute is not narrowly drawn to achieve those ends. The statute sweeps broadly: rather than regulate behavior alone, to insure that charities obtain adequate notice and/or to reduce the numbers of unused, donated tickets, the statute prescribes what the solicitor may say. The first amendment prohibits such an imprecisely drawn enactment. The state has other means of regulating the speaker's conduct: should the solicitor commit fraud, he may be investigated, charged, and convicted for that crime, or the state may prescribe the precise steps with which a solicitor must compiy when attempting to donate tickets to charity. This section of the statute, dictating what a professional solicitor may, and may *not* say, is unconstitutional. Plaintiffs, therefore, have a substantial likelihood of success on the merits of this challenge.

(5) Attorney General's Request for Information from Professional Solicitor

The Court previously concluded that the plaintiffs' challenge to the subsection stating that the professional solicitor's registration form must contain "any other information that the attorney general may require," R.C. § 1716.07(B), stated a claim upon which relief could be granted, as it lacked the "narrow, objective and definite" standards required by *Forsyth County,* 112 S.Ct. at 2401, for administrative review of a license which implicates the first amendment. The Court now determines that plaintiffs have a substantial likelihood of success on the merits of this challenge.

The language does nothing to limit the attorney general's discretion and permits the constitutionally forbidden – a public official to impose a unique reporting requirement on a politically or socially disfavored group. "[T]he success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so." *Forsyth County,* at 2403 n.10. As the language of the statute provides the Attorney General with unlimited discretion, this section lacks narrow, objective and definite standards, and permits "the danger of censorship and of abridgment of our precious first amendment freedoms". *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 553 (1975).

(6) Required Description of the Charitable Program

The Court previously concluded that the plaintiffs' challenge to the subsection requiring that the solicitor file "a full and fair description of the charitable program for which the solicitation is being carried out," R.C. § 1716.07(D)(2)(f), stated a claim upon which relief could be granted, as it lacked the "narrow, objective and definite" standards required by *Forsyth County*, 112 S.Ct. at 2401, for administrative review of a license which implicates the first amendment.

The Court now concludes that plaintiffs have a substantial likelihood of success on the merits of their challenge to the constitutionality of this subsection. The subsection suffers from two constitutional flaws: it is unconstitutionally vague and violates both the first and the fourteenth amendment. It violates the latter's due process clause requirement that a criminal statute[46] "define the offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Particularly in this context, where the statute "threatens exercises of otherwise permissible First Amendment rights, the enactment must provide more notice and allow less discretion than for other activities." *United States v. Thomas*, 864 F.2d 188, 194 (D.C. Cir. 1988)

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[46] Though this statute is a civil regulation of charitable solicitation, it provides that those who violate its provisions are guilty of "solicitation fraud, a misdemeanor of the first degree." R.C. § 1716.99(A).

(Starr, J.). This subsection also violates the first amendment's requirement that licenses affecting the exercise of first amendment rights contain "narrow, objective and definite standards to guide the licensing authority." *Forsyth County* at 2401.

The language in this subsection of the statute, requiring a *"full and fair* description of a charity's program" (emphasis added), is vague and fails to provide adequate notice to those subject to its provisions while also permitting excessive discretion in the review of a license affecting the first amendment. The requirement of a "full and fair description" of the legislature's expectations offers amorphous, subjective notice to those who must portray a charity's activities in order to solicit funds. Those same words construct no safeguards to channel the discretion of those charged with the enforcement of the statute. *See e.g. Kolender* at 353-54 ("the statute . . . is unconstitutionally vague within the meaning of the Due Process Clause of the Fourteenth Amendment by failing to clarify what is contemplated by the requirement that a suspect provide a 'credible and reliable' identification."). The plaintiffs have a substantial likelihood of success on the merits of their challenge to this section of the statute on either first or fourteenth amendment grounds.

To summarize the discussion on the motion for a preliminary injunction to this point, the Court has determined that plaintiffs have demonstrated a substantial likelihood of success on the claim challenging the constitutionality of the requirements limiting the solicitation for the purpose of distributing information regarding missing children, R.C. § 2901.32(A) and (B). The Court

also concluded that plaintiffs have a substantial likelihood of success on the merits of their challenges to: the requirement that professional solicitors shall limit their descriptions of the use of donated tickets, R.C. § 1716.08(D), the requirement that the registration statement for professional solicitors contain any information that the attorney general may require, R.C. § 1716.07(B), and the requirement that professional solicitors file a "full and fair" description of the solicitation campaign with the attorney general, R.C. § 1716.07(D)(2)(f). The substantial likelihood of success on the merits of these three claims weighs in favor of granting a preliminary injunction on these issues.

Earlier, in its consideration of the plaintiffs' motion for a preliminary injunction, the Court addressed whether plaintiffs had a substantial likelihood of success of prevailing on other claims. The *lack* of substantial likelihood of success on the remaining challenges – that the statute discriminates against small and unpopular charities, that the religious exemption is unconstitutional, that it lacks essential procedural safeguards, that it contains vague penalty provisions, that it violates felons' first amendment rights, and that the sections mandating specific contractual clauses, a registration fee structure and bonding requirements are unconstitutional – counsels against granting the preliminary injunction on these claims.

2. Irreparability of Harm

The deprivation of first amendment rights for even a minimal period of time constitutes *per se* irreparable

harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). This factor counsels the issuance of a preliminary injunction on the four claims upon which plaintiffs have demonstrated a substantial likelihood of success on the merits.

3. Balancing of the Equities

There has been no evidence that issuance of an injunction would have a harmful impact on third parties. If an injunction is issued, there is only the possibility of harm to one defendant, the State. The City Attorney of Dayton has stated that no prosecution has occurred under this statute and that he has not enforced.and is not enforcing the provisions of this statute. Doc. #27 at 2. The Prosecuting Attorney of Montgomery County has not been an active participant in this litigation and views the litigation principally as a dispute between the state and plaintiffs. Doc. #41. Accordingly, the issuance of a preliminary injunction would not represent a significant injury to either of these defendants. Even the state would not be harmed: the scope of the injunctive relief is narrow, enjoining enforcement, rather than passing on the constitutionality of the statute; a final determination will not be made until the conclusion of the trial on the merits. Nothing prevents the Court from altering its initial conclusions, reached herein, at a later trial on the merits. Accordingly, there will be minimal harm to the defendants if the injunction issues.

The plaintiffs, however, will suffer significant harm if the injunction does *not* issue. The plaintiffs have already been most patient in awaiting this Court's ruling on their

motion for a preliminary injunction. As the Court has determined, albeit in provisional fashion, that sections of the challenged statute violate the constitution, thereby causing plaintiffs irreparable injury, plaintiffs will continue to suffer injury to their constitutional rights if the injunction does not issue. Accordingly, balancing the equities (the harm to defendants if the injunction does issue, and the harm to plaintiffs if the injunction does *not* issue), the Court finds that the equities weigh in favor of the issuance of the injunction.

4. Public Interest

The public interest is served by protecting first amendment rights. This factor suggests that an injunction should issue.

IV. Conclusion

WHEREFORE, for the reasons stated above, the Court grants the State's motion to dismiss, Doc. #23, on the facial challenges to: the point of solicitation disclosures, R.C. § 1716.08(B)(1) and (2); the registration requirement, R.C. § 1716.04(A), for charitable organizations and the requirement that the professional solicitor file a solicitation notice, R.C. § 1716.07(D);[47] and the mandatory financial controls concerning bank accounts,

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[47] The Court excepts the section beginning "any other information . . . " contained in R.C. § 1716.07(B) and the entirety of R.C. § 1716.07(D)(2)(f) from the scope of its order granting the state's motion to dismiss on the registration and notice of solicitation requirements.

R.C. § 1716.07(F). The Court denies the State's motion to dismiss on the facial challenges to the required contractual clauses, R.C. § 1716.08(A) and (C); on the requirement that the professional solicitors shall limit their descriptions of the use of donated tickets, R.C. § 1716.08(D); on the registration fees, R.C. § 1716.02(D), for charitable organizations and the registration fees, § 1716.07(B), and the bond requirements, R.C. § 1716.07(C), for professional solicitors; and on the as-applied challenge to the statute.

Ruling further, the Court denies the motion to dismiss directed to the subsections setting forth the requirement that the professional solicitor's registration statement must contain "any other information that the attorney general may require," R.C. § 1716.07(B), and stating the requirement that the solicitor file "a full and fair description of the charitable program for which the solicitation is being carried out," R.C. § 1716.07(D)(2)(f).

Ruling still further, the Court grants in part and denies in part Plaintiff's motion for a preliminary injunction. The Court grants the motion for a preliminary injunction on the following challenges and hereby preliminarily enjoins the defendants from directing professional solicitors to submit "any other information that the attorney general may require" other than that specified in R.C. § 1716.07(B), the section setting forth the registration requirements for professional solicitors; the Court enjoins defendants from requiring professional solicitors to file a "full and fair description" of their campaign with the attorney general, R.C. § 1716.07(D)(2)(f); the Court further enjoins defendants from enforcing R.C. § 1716.08(D), the requirement that professional solicitors shall limit

their descriptions of the use of donated tickets; and R.C. § 2901.32(A) and (B), the requirements limiting solicitation for the purpose of distributing information regarding missing children. The Court denies the motion for a preliminary injunction directed at the following facial challenges: the statute's differential treatment of smaller, unpopular charities, its exemption of religious organizations, its allegedly inadequate procedural safeguards, its allegedly vague penalty provisions, its prohibition against felons and those convicted of violating Ohio's charitable solicitation law, R.C. § 1716.07(I), from employment as professional solicitors, the required contractual clauses, R.C. § 1716.08(A), the registration fees, R.C. § 1716.02(D) for charitable organizations and the registration fees, R.C. § 1716.07(B), and bonding requirements, R.C. § 1716.07(C) for professional solicitors; and the as-applied challenge that certain components of the statute operate to burden plaintiffs protected speech rights.

As a practical matter, the Court has resolved all but one claim in this litigation – the as-applied challenge to the statute. All other issues have been resolved, either by the Court's ruling on the motion to dismiss, Doc. #23, or by its ruling on the motion for a preliminary injunction, Doc. #3. Specifically, the ruling on the motion to dismiss rejected the following facial challenges to the constitutionality of:

(1) the point of solicitation disclosures, R.C. § 1716.08(B)(1) and (2);

(2) the registration requirement, R.C. § 1716.04(A), for charitable organizations and the requirement that the professional solicitor file a solicitation notice, R.C. § 1716.07(D); and

(3) the mandatory financial controls concerning bank accounts, R.C. § 1716.07(F).

Likewise, the ruling on the motion for a preliminary injunction indicated that plaintiffs lacked a substantial likelihood of success on the merits of their facial challenges to the constitutionality of:

(4) the statute's differential treatment of smaller, unpopular charities;

(5) its exemption of religious organizations;

(6) its allegedly inadequate procedural safeguards;

(7) its allegedly vague penalty provisions;

(8) its prohibition against felons and those convicted of violating Ohio's charitable solicitation law from employment as professional solicitors, R.C. § 1716.07(I);

(9) the required contractual clauses, R.C. § 1716.08(A); and

(10) the registration fees, R.C. § 1716.02(D), for charitable organizations and the registration fees, § 1716.07(B), and bond requirements, R.C. § 1716.07(C), for professional solicitors.

In ruling on the motion for a preliminary injunction, this Court also indicated that the plaintiffs lacked a substantial likelihood of success on the merits of their as-applied challenge to the constitutionality of

(11) five components of the statute's practical effect on the plaintiffs' speech rights.

As the challenges enumerated in items (4) through (10) were facial challenges, the Court concludes that, given

their facial nature, it is most unlikely that a subsequent trial on the merits will alter this Court's judgment of the legal substance of these claims. *But see* footnote 30 (noting that if plaintiffs eventually prevail on their as-applied challenge, they may revive their equal protection challenge to the entire statute). The as-applied challenge is still before the Court, as it survived the motion to dismiss, and the Court concluded that, while there was not a substantial likelihood of success on the merits, that finding rested on the sparseness of the material in the factual record, rather than an immutable legal determination.[48]

Finally, having overruled the State's motion to dismiss directed to certain claims raised by the plaintiffs, the Court granted plaintiffs' motion for a preliminary injunction directed toward three of those claims, as well as one other, finding a substantial likelihood of success on the merits, the existence of irreparable injury, and that the balancing of the equities and the public interest favored the issuance of an injunction. The four claims upon which the Court granted the motion for a preliminary injunction were:

> (12) the requirement that professional solicitors submit "any other information that the attorney general may require," other than that specified in R.C. § 1716.07(B), the section setting forth the registration requirements for professional solicitors;

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[48] Should these plaintiffs seek to bring additional claims on an as-applied basis, they will have to seek leave of the Court to file a second amended complaint.

(13) the requirement that professional solicitors file a "full and fair description" of their campaign with the attorney general, R.C. § 1716.07(D)(2)(f);

(14) the requirement that professional solicitors shall limit their descriptions of the use of donated tickets, R.C. § 1716.08(D); and

(15) the requirements limiting solicitation for the purpose of distributing information regarding missing children, R.C. § 2901.32(A) and (B).

To the extent that the Court has sustained these four facial challenges, by granting in part the plaintiffs' motion for a preliminary injunction, potential as-applied challenges directed to these sections and approaches have been mooted.

The attorneys are directed to consider steps leading to a rapid resolution of the remaining matter in this litigation. The attorneys are directed to consider whether: a trial is necessary on the as-applied challenge to the statute, a claim which survived the motion to dismiss, but upon which this Court did not grant the motion for a preliminary injunction, or if the remaining factual issues may be stipulated and the outstanding issues thus resolved on cross-motions for summary judgment. Additionally, the attorneys are directed to consider whether an immediate appeal to the Court of Appeals on the grant in part and denial in part of the plaintiffs' motion for a preliminary injunction, pursuant to 28 U.S.C. § 1292(a)(1), would facilitate resolution of this matter.

The attorneys are hereby notified that a telephone conference call to discuss the above matters is scheduled for Tuesday, August 17, 1993, at 5:15 p.m.

July 30, 1993 /s/ Walter Herbert Rice
WALTER HERBERT RICE
UNITED STATES DISTRICT JUDGE

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Chapter 1716: Charitable Organizations

Section 1716.01 Definitions.

As used in this chapter:

(A) "Charitable organization" means either of the following:

(1) Any person that is determined by the internal revenue service to be a tax exempt organization pursuant to section 501(c)(3) of the Internal Revenue Code;

(2) Any person that is or holds itself out to be established for any benevolent, philanthropic, patriotic, educational, humane, scientific, public health, environmental conservation, civic, or other eleemosynary purpose or for the benefit of law enforcement personnel, fire fighters, or other persons who protect the public safety, or any person who in any manner employs a charitable appeal as the basis of any solicitation or an appeal that suggests that there is a charitable purpose to any solicitation.

"Charitable organization" is not limited to only those organizations to which contributions are tax deductible under section 170 of the Internal Revenue Code.

"Charitable organization" does not include an employer who is not engaged in the business of soliciting contributions or conducting charitable sales promotions but who incidentally solicits contributions for a charitable organization or purpose; or a

compensated employee of an employer not engaged in the business of soliciting contributions or conducting charitable sales promotions, when the employee solicits contributions or conducts charitable sales promotions at the direction of his employer.

(B) "Charitable purpose" means either of the following:

(1) Any purpose described in section 501(c)(3) of the Internal Revenue Code;

(2) Any benevolent, philanthropic, patriotic, educational, humane, scientific, public health, environmental conservation, civic, or other eleemosynary objective or any objective that benefits law enforcement personnel, fire fighters, or other persons who protect the public safety.

"Charitable purpose" is not limited to only those purposes for which contributions are tax deductible under section 170 of the Internal Revenue Code.

(C) "Charitable sales promotion" means any advertising or sale conducted by a person who represents that the purchase or use of goods or services offered by the person will benefit, in whole or in part, any charitable organization or charitable purpose. The provision of advertising services to a charitable organization, either for compensation or as a donation, does not of itself constitute a charitable sales promotion.

(D) "Commercial co-venturer" means any person who for profit regularly and primarily is engaged in trade or commerce other than in connection with soliciting for

charitable organizations or charitable purposes and who conducts a charitable sales promotion.

(E) "Contribution" means the promise, pledge, or grant of any money or property, financial assistance, or any other thing of value in response to a solicitation. "Contribution" does not include any bona fide fees, or any dues or assessments paid by members, provided that membership is not conferred solely as a consideration for making a contribution in response to a solicitation.

(F) "Fund-raising counsel" means any person who, for compensation, plans, manages, advises, consults, or prepares material for or with respect to the solicitation in this state of contributions for any charitable organization or at any time has custody of contributions from a solicitation, but does not solicit contributions and does not employ, procure, or otherwise engage any compensated person to solicit contributions. "Fund-raising counsel" does not include the following:

(1) An attorney, investment counselor, or banker who in the conduct of his profession advises a client;

(2) A charitable organization or a bona fide officer, employee, or volunteer of a charitable organization, when the charitable organization has full knowledge of the services being performed on its behalf and either of the following applies:

(a) The services performed by the charitable organization, bona fide officer, employee, or volunteer are performed on behalf of the charitable organization that employs the bona fide officer

or employee or engages the services of the bona fide volunteer;

(b) The charitable organization on whose behalf the services are performed shares some element of common control or an historic or continuing relationship with the charitable organization that performs the services or employs the bona fide officer or employee or engages the services of the bona fide volunteer;

(3) An employer who is not engaged in the business of soliciting contributions or conducting charitable sales promotions but who incidentally solicits contributions for a charitable organization or purpose without compensation;

(4) A compensated employee of an employer who is not engaged in the business of soliciting contributions or conducting charitable sales promotions, when the employee solicits contributions or conducts charitable sales promotions at the direction of his employer.

(G) "Internal Revenue Code" means the "Internal Revenue Code of 1986," 100 Stat. 2085, 26 U.S.C.A. 1, as amended.

(H) "Person" has the same meaning as in section 1.59 of the Revised Code and includes a group, foundation, or any other entity however styled.

(I) "Professional solicitor" means any person who, for compensation, performs on behalf of or for the benefit of a charitable organization any service in connection

with which contributions are or will be solicited in this state by the compensated person or by any person it employs, procures, or otherwise engages directly or indirectly to solicit contributions. "Professional solicitor" does not include the following:

(1) An attorney, investment counselor, or banker who in the conduct of his professional [sic] advises a client;

(2) A charitable organization or a bona fide officer, employee, or volunteer of a charitable organization, when the charitable organization has full knowledge of the services being performed on its behalf and either of the following applies:

(a) The services performed by the charitable organization, bona fide officer, employee, or volunteer are performed on behalf of the charitable organization that employs the bona fide officer or employee or engages the services of the bona fide volunteer;

(b) The charitable organization on whose behalf the services are performed shares some element of common control or an historic or continuing relationship with the charitable organization that performs the services or employs the bona fide officer or employee or engages the services of the bona fide volunteer;

(3) An employer who is not engaged in the business of soliciting contributions or conducting charitable sales promotions but who incidentally solicits contributions for a

charitable organization or purpose without compensation;

(4) A compensated employee of an employer who is not engaged in the business of soliciting contributions or conducting charitable sales promotions, when the employee solicits contributions or conducts charitable sales promotions at the direction of his employer.

(J) "Solicit" or "solicitation" means to request or a request directly or indirectly for money, property, financial assistance, or any other thing of value on the plea or representation that such money, property, financial assistance, or any other thing of value on the plea or representation that such money, property, financial assistance, or [sic] other thing of value or a portion of it will be used for a charitable purpose or will benefit a charitable organization. "Solicit" or "solicitation" includes but is not limited to the following methods of requesting or securing the promise, pledge, or grant of money, property, financial assistance, or any other thing of value:

(1) Any oral or written request;

(2) Making any announcement to the press, on radio or television, by telephone or telegraph, or by any other communication device concerning an appeal or campaign by or for any charitable organization or for any charitable purpose;

(3) Distributing, circulating, posting, or publishing any handbill, written advertisement, or other publication that directly or by implication seeks to obtain any contribution;

(4) Selling or offering or attempting to sell any advertisement, advertising space, book, card, tag, coupon, chance, device, magazine, membership, merchandise, subscription, sponsorship, flower, ticket, admission, candy, cookies, or other tangible item, or any right of any description in connection with which an appeal is made for any charitable organization or charitable purpose, or when the name of any charitable organization is used or referred to in any such appeal as an inducement or reason for making the sale, or when in connection with the sale or offer or attempt to sell, any statement is made that all or part of the proceeds from the sale will be used for any charitable purpose or will benefit any charitable organization.

A solicitation is considered as having taken place whether or not the person making the solicitation receives any contribution. A solicitation does not occur when a person applies for a grant or an award to the government or to an organization that is exempt from federal income taxation under section 501(a) and described in section 501(c)(3) of the Internal Revenue Code.

Section 1716.02 Registration of charitable organizations.

(A) Every charitable organization, except those exempted under section 1716.03 of the Revised Code, that intends to solicit contributions in this state by any means or have contributions solicited in this state on its behalf by any other person, charitable organization, commercial co-venturer, or professional solicitor, or that participates

in a charitable sales promotion, prior to engaging in any of these activities and annually thereafter, shall file a registration statement with the attorney general upon a form prescribed by him. Each chapter, branch, or affiliate of a charitable organization that is required to file a registration statement under this section either shall file a separate registration statement or report the necessary information to its parent charitable organization that then shall file a consolidated registration statement. The annual registration statement shall be refiled on or before the fifteenth day of the fifth calendar month after the close of each fiscal year in which the charitable organization solicited in this state, or by the date of any applicable extension of the federal filing date, whichever is later. No charitable organization that is required to register under this chapter prior to registration, shall solicit contributions in this state by any means, have contributions solicited in this state on its behalf by any other person, charitable organization, commercial co-venturer, or professional solicitor, or participate in a charitable sales promotion.

(B) The registration statement shall be signed and sworn to under penalties of perjury by the treasurer or chief fiscal officer of the charitable organization and shall contain the following information:

(1) The name of the charitable organization, the purpose for which it is organized, and the name or names under which it intends to solicit contributions;

(2) The address and telephone number of the principal place of business of the charitable organization and the address and telephone number of every office, chapter, branch, or affiliate of the charitable organization located in this state or, if the charitable organization does not maintain an office in this state, the name, address, and telephone number of the person that has custody of its financial records;

(3) The names and addresses of the officers, directors, trustees, and executive personnel of the charitable organization;

(4) The annual financial report of the charitable organization for the immediately preceding fiscal year as required under section 1716.04 of the Revised Code;

(5) The last day of the fiscal year for the charitable organization;

(6) A statement of whether the charitable organization is registered with or otherwise authorized by any other governmental authority in this state or another state to solicit contributions;

(7) A statement of whether the charitable organization has had its registration or authority denied, suspended, revoked, or enjoined by any court or other governmental authority in this state or another state;

(8) A statement of whether the charitable organization intends to solicit contributions from the public directly by using its own resources or to have solicitations made on its behalf through the use of

another charitable organization, fund-raising counsel, professional solicitors, or commercial co-venturers;

(9) The names, addresses, and the telephone numbers of any other charitable organization, fund-raising counsel, professional solicitors, and commercial co-venturers who act or will act on behalf of the charitable organization, together with a statement setting forth the specific terms of the arrangements for salaries, bonuses, commissions, expenses, or other remunerations to be paid the other charitable organization, fund-raising counsel, professional solicitors, and commercial co-venturers. If any of the information required by division (B)(9) of this section is not available at the time of registration, that information shall be submitted to the attorney general at a later date but before any solicitation occurs.

(10) The charitable purpose or purposes for which the contributions to be solicited will be used;

(11) The names, addresses, and telephone numbers of the person within the charitable organization that will have final responsibility for the custody of the contributions;

(12) The names of the person within the charitable organization that will be responsible for the final distribution of the contributions;

(13) The period of time during which, and the counties in which, the solicitation is planned to be conducted;

(14) A schedule of the activities carried on by the charitable organization in the performance of its purposes;

(15) Any other information that the attorney general may, by rule, require.

(C)(1) With the initial registration only, every charitable organization that is required to register under this chapter also shall file with the attorney general the following:

(a) A copy of the current charter, articles of incorporation, agreement of association, instrument of trust, constitution, or other organizational instrument, and a copy of the bylaws of the charitable organization;

(b) A statement setting forth the place where and the date when the charitable organization was legally established, the form of its organization, and its tax exempt status, with a copy of its federal tax exemption determination letter.

(2)(a) With the next annual registration statement filed after its adoption, the charitable organization shall file with the attorney general a copy of any amendment to its organizational instrument as specified in division (C)(1)(a) of this section and a copy of any amendment to its bylaws.

(b) Within thirty days after its receipt, the charitable organization shall file with the

attorney general, a copy of any federal tax exemption determination letter or any correspondence rescinding its tax exempts [sic] status that is received after the initial registration. Not later than thirty days after being notified by the internal revenue service of any challenge to or investigation of its continued entitlement to federal tax exemption, the charitable organization shall notify the attorney general of this fact.

(D)(1) Except as otherwise provided in division (D)(2) of this section, every charitable organization that is required to register under this chapter shall pay the following fees with each registration:

(a) Fifty dollars, if the contributions received for the last calendar or fiscal year were five thousand dollars or more but less than twenty-five thousand dollars;

(b) One hundred dollars, if the contributions received for the last calendar or fiscal year were twenty-five thousand dollars or more but less than fifty thousand dollars;

(c) Two hundred dollars, if the contributions received for the last calendar or fiscal year were fifty thousand dollars or more.

(2) A charitable organization that is required to register under this chapter and whose contributions received for the last calendar or fiscal year were less than five thousand dollars shall not pay any registration fee.

(3) The amount of registration fees that a charitable organization is required to pay under division (D)(1) of this section shall be based on the amount of contributions that it receives from persons in this state. If, for any reporting year, a charitable organization cannot determine from its records the exact amount of contributions it received from persons in this state, it shall compute the amount of the registration fee upon the estimated amount of contributions it received from persons in this state, with the estimated amount to be explained in writing at the time the registration fee is paid. At the request of the attorney general, the charitable organization shall substantiate the estimated amount of contributions it received from persons in this state.

(4) All registration fees shall be paid into the state treasury to the credit of the charitable foundations fund established under section 109.32 of the Revised Code.

Section 1716.03 Exemptions.

The following shall not be required to file a registration statement as provided in section 1716.02 of the Revised Code:

(A) Any religious agencies and organizations, and charities, agencies, and organizations operated, supervised, or controlled by a religious organization;

(B) Any charitable organization that meets all of the following requirements:

(1) It has been in continuous existence in this state for a period of at least two years;

(2) It has received from the internal revenue service a determination letter that is currently in effect, stating that the charitable organization is exempt from federal income taxation under subsection 501(a) and described in subsection 501(c)(3) of the Internal Revenue Code;

(3) It has registered with the attorney general as a charitable trust pursuant to section 109.26 of the Revised Code;

(4) It has filed an annual report with and paid the required fee to the attorney general pursuant to section 109.31 of the Revised Code.

(C) Any educational institution, when solicitation of contributions is confined to alumni, faculty, trustees, or the student membership and their families;

(D) Every person other than an individual, when solicitation of contributions for a charitable purpose or on behalf of a charitable organization is confined to its existing membership, present or former employees, or present or former trustees;

(E) Any charitable organization that does not receive gross revenue, excluding grants or awards from the government or an organization that is exempt from federal income taxation under section 501(a) and described in section 501(c)(3) of the Internal Revenue Code, in excess of twenty-five thousand dollars during its immediately preceding fiscal year, if the organization

does not compensate any person primarily to solicit contributions.

If the gross revenue, excluding grants or awards from the government or an organization that is exempt from federal income taxation under section 501(a) and described in section 501(c)(3) of the Internal Revenue Code, of any charitable organization received during any fiscal year exceeds twenty-five thousand dollars, the charitable organization, within thirty days after the receipt of the revenue, shall file a registration statement with the attorney general pursuant to section 1716.02 of the Revised Code.

Section 1716.04 Annual financial report of charitable organizations.

(A) Every charitable organization that is required to register pursuant to this chapter shall file an annual financial report with the attorney general upon a form prescribed by him. The report shall include all of the following:

(1) A balance sheet;

(2) A statement of support, revenue, and expenses, and any changes in the fund balance;

(3) The names and addresses of the charitable organizations, fund-raising counsel, professional solicitors, and commercial co-venturers used, if any, and the amounts of money received from each of them, if any.

(4) A statement of functional expenses that shall include, but not be limited to, expense of the following categories:

(a) Program;

(b) Management and general;

(c) Fund-raising.

(5) Any other information that the attorney general, by rule, may require.

(B) The attorney general shall accept a copy or duplicate original of a financial statement, report, or return filed by the charitable organization with the internal revenue service. The attorney general, by rule, may require additional information as part of the annual financial report. Any consolidated financial report filed with the attorney general shall include information about the parent charitable organization as such and the financial information arising out of the activities of each chapter, branch, or affiliate of the charitable organization in this state that is covered by the financial statement, report, or return filed by the charitable organization with the internal revenue service.

Section 1716.05 Fund-raising counsel.

(A) No person shall act as a fund-raising counsel unless he first has complied with the requirements of this chapter and any rules adopted under this chapter.

(B) Any fund-raising counsel that at any time has custody of contributions from a solicitation shall do all of the following:

(1) Register with the attorney general. Applications for registration or renewal of registration shall be in writing, under oath, and in the form prescribed by the attorney general, and shall be accompanied by a fee in the amount of two hundred dollars. Any corporation, partnership, association, or other entity that intends to act as a fund-raising counsel may register for and pay a single fee of two hundred dollars on behalf of all its members, officers, employees, and agents. In that case, the names and addresses of all the officers, employees, and agents of the fund-raising counsel and all other persons with whom the fund-raising counsel has contracted to work under its direction shall be listed in the application. The application shall contain any other information that the attorney general may require. The registration or renewal of registration shall be for a period of one year or part of one year and shall expire on the thirty-first day of March of each year. All fees prescribed in this division shall be paid into the state treasury to the credit of the charitable foundations fund established under section 109.32 of the Revised Code.

(2) At the time of making an application for registration or renewal of registration, file with and have approved by the attorney general a bond in which the fund-raising counsel shall be the principal obligor, in the sum of twenty-five thousand dollars, with one or more sureties authorized to do business in this state. The fund-raising counsel shall maintain the bond in effect as long as the registration is in effect; however, the

liability of the surety under the bond shall not exceed an all-time aggregate liability of twenty-five thousand dollars. The bond, which may be in the form of a rider to a larger blanket liability bond, shall run to the state and to any person who may have a cause of action against the principal obligor of the bond for any liability arising out of a violation by the obligor of any provision of this chapter or any rule adopted pursuant to this chapter.

(3) Not later than ninety days after a solicitation campaign has been completed and on the anniversary of the commencement of a solicitation campaign lasting more than one year, furnish an accounting of all contributions collected and expenses paid, to the charitable organization with which the fund-raising counsel has contracted. The accounting shall be in writing and shall be retained by the charitable organization for three years. The fund-raising counsel shall file a copy of the accounting with the attorney general not later than seven days after it is furnished to the charitable organization.

(4) Not later than two days after receipt of each contribution, deposit the entire amount of the contribution in an account at a bank or other federally insured financial institution which shall be in the name of the charitable organization with which the fund-raising counsel has contracted. Each contribution collected by the fund-raising counsel shall be solely in the name of that charitable organization. The charitable

organization shall have sole control of all withdrawals from the account and the fund-raising counsel shall not be given the authority to withdraw any deposited funds from the account.

(5) During each solicitation campaign and for not less than three years after its completion, maintain the following records that shall be made available to the attorney general upon his request:

(a) A record of each contribution that at any time is in the custody of the fund-raising counsel, including the name and address of each contributor and the date and amount of the contribution, provided that the attorney general shall not disclose that information except to the extent necessary for investigative or law enforcement purposes;

(b) The location of each bank or financial institution in which the fund-raising counsel has deposited revenue from the solicitation campaign and the account number of each account in which the deposits were made.

(C) Unless otherwise provided in this section, any change in any information filed with the attorney general pursuant to this section shall be reported in writing to the attorney general within seven days after the change occurs.

(D) No person shall serve as a fund-raising counsel, or be a member, officer, employee, or agent of any fund-

raising counsel, who has been convicted in the last five years of either of the following:

(1) Any violation of this chapter or any rule adopted under this chapter, or of any charitable solicitation legislation or regulation of a political subdivision of this state or charitable solicitation law of any other jurisdiction that is similar to this chapter;

(2) A felony in this or another state.

(E) The information provided under this section to the attorney general by a fund-raising counsel shall be included in the reports and files required to be complied and maintained by the attorney general pursuant to division (E) and (F) of section 1716.08 of the Revised Code.

Section 1716.07 Professional solicitors.

(A) No professional solicitor shall engage in any solicitation unless it has complied with the requirements of this chapter and any rules adopted under this chapter.

(B) Every professional solicitor, before engaging in any solicitation, shall register with the attorney general. Applications for registration or renewal of registration shall be in writing, under oath, and in the form prescribed by the attorney general, and shall be accompanied by a fee in the amount of two hundred dollars. Any corporation, partnership, association, or other entity that intends to act as a professional solicitor may register for and pay a single fee of two hundred dollars on behalf of all its members, officers, employees, agents, and solicitors. In that case, the names and addresses of all the

officers, employees, and agents of the professional solicitor and all other persons with whom the professional solicitor has contracted to work under its direction, including solicitors, shall be listed in the application or furnished to the attorney general within five days of the date of employment or contractual arrangement. The application shall contain any other information that the attorney general may require. The registration shall be for a period of one year or part of one year and shall expire on the thirty-first day of March of each year. Upon application and payment of the fee specified in this division and filing of the bond prescribed in division (C) of this section, the registration may be renewed for additional one-year periods. All fees prescribed in this division shall be paid into the state treasury to the credit of the charitable foundations fund established under section 109.32 of the Revised Code.

(C) At the time of making an application for registration or renewal of registration, the professional solicitor shall file with and have approved by the attorney general a bond in which the professional solicitor shall be the principal obligor, in the sum of twenty-five thousand dollars, with one or more sureties authorized to do business in this state. The professional solicitor shall maintain the bond in effect as long as the registration is in effect; however, the liability of the surety under the bond shall not exceed an all-time aggregate liability of twenty-five thousand dollars. The bond, which may be in the form of a rider to a larger blanket liability bond, shall run to the state and to any person who may have a cause of action against the principal obligor of the bond for any liability arising out of a violation by the obligor of any provision

of this chapter or any rule adopted pursuant to this chapter.

(D)(1) Prior to the commencement of any solicitation, the professional solicitor shall file all of the following with the attorney general:

(a) A completed document called "Solicitation Notice" upon a form prescribed by the attorney general and containing all of the information specified in division (D)(2) of this section;

(b) A copy of the contract described in division (A) of section 1716.08 of the Revised Code;

(c) A sworn statement by the charitable organization on whose behalf the professional solicitor is acting certifying that the solicitation notice and any accompanying material are true and correct to the best of its knowledge.

(2) The solicitation notice shall include all of the following:

(a) The fund-raising methods to be used;

(b) The projected dates when the solicitation will commence and terminate;

(c) The location and telephone number from where the solicitation will be conducted if it will be conducted by telephone;

(d) The name and residence address of each person responsible for directing and supervising the conduct of the solicitation campaign;

(e) A statement of whether the professional solicitor will at any time have custody of any contributions;

(f) A full and fair description of the charitable program for which the solicitation campaign is being carried out;

(g) The written and signed consent of every charitable organization on whose behalf the professional solicitor will be soliciting contributions or whose name will be mentioned during the solicitation.

(E) Not later than ninety days after the solicitation campaign has been completed and on the anniversary of the commencement of a solicitation campaign lasting more than one year, the professional solicitor shall provide to the charitable organization and file with the attorney general a financial report of the campaign, including the gross revenue received and an itemization of all expenses incurred. The report shall be completed on a form prescribed by the attorney general and signed by an authorized official of the professional solicitor who shall certify under oath that the report is true and correct.

(F) Each contribution collected by or in the custody of the professional solicitor shall be solely in the name of the charitable organization on whose behalf the contribution was solicited. Not later than two days after receipt of each contribution, the professional solicitor shall deposit the entire amount of the contribution in an account at a bank or other federally insured financial insttution, which shall be in the name of that charitable oganization. The charitable organization shall have sole control

of all withdrawals from the account and the professional solicitor shall not be given the authority to withdraw any deposited funds from the account.

(G)(1) During each solicitation campaign and for not less than three years after its completion, the professional solicitor shall maintain the following records:

(a) The name and, if known to the professional solicitor, the address and telephone number of each contributor and the date and amount of the contribution, provided that the attorney general shall not disclose that information except to the extent necessary for investigative or law enforcement purposes;

(b) The name and residence address of each employee, agent, and any other person, however designated, who is involved in the solicitation, the amount of compensation paid to each, and the dates on which the payments were made;

(c) A record of all contributions that at any time are in the custody of the professional solicitor;

(d) A record of all expenses incurred by the professional solicitor for the payment of which the professional solicitor is liable;

(e) A record of all expenses incurred by the professional solicitor for the payment of which the charitable organization is liable;

(f) The location of each bank or financial institution in which the professional solicitor has deposited revenue from the solicitation campaign and the account number of each account in which the deposits were made;

(g) A copy of each pitch sheet or solicitation script used during the solicitation campaign.

(h) If a refund or a contribution has been requested, the name and address of each person requesting the refund, and if a refund was made, its amount and the date it was made.

(i) Any other record of such information as the attorney general may require.

(2) If the professional solicitor sells tickets to any event and represents that the tickets will be donated for use by another person, the professional solicitor also shall maintain for the same period as specified in division (G)(1) of this section the following records:

(a) The name and address of each contributor that purchases or donates tickets and the number of tickets purchased or donated by the contributor;

(b) The name and address of each organization that receives the donated tickets for the use of others, and the number of tickets received by the organization.

(3) Any of the records described in divisions (G)(1) and (2) of this section shall be made available to the attorney general upon his

request and shall be furnished to him within ten days of the request.

(H) Unless otherwise provided in this section or section 1716.08 of the Revised Code, any change in any information filed with the attorney general pursuant to this section and section 1716.08 of the Revised Code shall be reported in writing to the attorney general within seven days after the change occurs.

(I) No person shall serve as a professional solicitor, or be a member, officer, employee, or agent of any professional solicitor who has been convicted in the last five years of either of the following:

(1) Any violation of this chapter or any rule adopted under this chapter, or of any charitable solicitation legislation or regulation of a political subdivision of this state or charitable solicitation law of any other jurisdiction that is similar to this chapter;

(2) A felony in this or another state.

Section 1716.08 Contracts with professional solicitors; point of solicitation disclosures; annual report by attorney general.

(A) Every contract entered into by any professional solicitor with any charitable organization shall be in writing, shall clearly state the respective obligations of the professional solicitor and the charitable organization, and shall contain the percentage of the gross revenue from the solicitation campaign that the charitable organization will receive. That percentage shall be either a fixed percentage of the gross revenue or a reasonable estimate of the

percentage of the gross revenue, subject to and in accordance with divisions (A)(1), (2), and (3) of this section.

(1) If the compensation of the professional solicitor is contingent upon the number of contributions or the amount of revenue received from the solicitation campaign, the stated percentage of the gross revenue that the charitable organization will receive shall be a fixed percentage of the gross revenue.

(2) If the compensation of the professional solicitor is not contingent upon the number of contributions or the amount of revenue received from the solicition campaign the stated percentage of the gross revenue that the charitable organization will receive shall be a reasonable estimate of the percentage of the gross revenue, and the contract shall include the following:

(a) The assumptions upon which the estimate is based, which assumptions shall be based upon all of the relevant facts known to the professional solicitor regarding the solicitation to be conducted and the past performance of the solicitation campaigns conducted by the professional solicitor;

(b) A provision that the charitable organization is guaranteed a percentage of the gross revenue that is not less than ninety per cent of the amount of the reasonable estimate of that percentage.

(3) The stated percentages prescribed in divisions (A)(1) and (2) of this section shall exclude any amount that the charitable

organization, pursuant to the contract entered into with the professional solicitor, will pay as expenses of the solicitation campaign, including the costs of merchandise or services sold or events staged.

(B) A professional solicitor shall comply with, and shall be responsible for complying or causing compliance with each of the following requirements:

(1) Prior to verbally requesting a contribution, or contemporaneously with and accompanying a written request for a contribution, the following shall be clearly and conspicuously disclosed at the point of solicitation:

(a) The name of the professional solicitor as it is on file with the attorney general and a statement that the solicitation is being conducted by the person as a professional solicitor;

(b) The name and address of each charitable organization on behalf of which all or any part of the contribution collected will be used, if the charitable organization has not received from the internal revenue service a determination letter that is currently in effect, stating that the organization is exempt from federal income taxation under section 501(a) and described in section 501(c)(3) of the Internal Revenue Code, the particular charitable purpose or purposes to be advanced with the funds raised shall be disclosed.

(2) If requested by the person being solicited, the professional solicitor shall inform that

person of the fixed percentage of the gross revenue or the reasonable estimate of the percentage of the gross revenue, as prescribed in division (A) of this section, that the charitable organization will receive as a benefit from the solicitation campaign.

(C) A professional solicitor shall not represent that any part of the contributions received will be given or donated to any other charitable organization unless that charitable organization has given its written and signed consent pursuant to division (D)(2)(g) of section 1716.07 of the Revised Code.

(D)(1) A professional solicitor shall not represent that tickets to any event will be donated for use by another person, unless the following requirements are complied with:

(a) The professional solicitor shall have the written commitments from persons stating that they will accept donated tickets and specifying the number of tickets they are willing to accept.

(b) The written commitments are filed with the attorney general prior to any solicitation.

(2) The contributions solicited for donated tickets shall not be more than the amount representing the number of ticket commitments received from persons and filed with the attorney general pursuant to division (D)(1) of this section.

(3) Not later than seven calendar days prior to the date of the event, the professional solicitor shall given all donated tickets to each

person that made the written commitment to accept them.

(E) The attorney general shall prepare an annual report setting forth the activities of all professional solicitors and all fund-raising counsel that at any time have custody of contributions from a solicitation who are required to comply with the provisions of this chapter and any rules adopted under the provisions of this chapter. The report is a public record open to public inspection under section 149.43 of the Revised Code.

(F) The attorney general shall maintain a file for each registered professional solicitor and fund-raising counsel that at any time has custody of contributions from a solicitation. In that file, he shall place all information received by him from those registered professional solicitors or fund-raising counsel and any letters received from citizens and charitable organizations regarding the work of the professional fund raiser or fund-raising counsel. The files are public records open to public inspection under section 149.43 of the Revised Code.

Section 1716.09 Commercial co-venturers.

(A) Prior to the commencement of any charitable sales promotion in this state conducted by a commercial co-venturer on behalf of a charitable organization, the commercial co-venturer shall obtain the written consent of the charitable organization whose name will be used during the charitable sales promotion.

(B) In conducting a charitable sales promotion, if the actual dollar amount or percentage per unit of goods

or services purchased or used that will benefit the charitable organization or charitable purpose has been determined, the commercial co-venturer shall disclose that amount or percentage in each advertisement for the charitable sales promotion. If the actual dollar amount of percentage per unit of goods or services purchased or used that will benefit the charitable organization or charitable purpose cannot reasonably be determined prior to the beginning of the charitable sales promotion, the commercial co-venturer shall disclose an estimated amount or percentage in each advertisement for the charitable sales promotion. The estimate shall be reasonable and shall be based on all the relevant facts known to the commercial co-venturer and the charitable organization.

(C) A commercial co-venturer shall keep a final accounting for each charitable sales promotion that it conducts for a period of three years following the completion of the charitable sales promotion. A commercial co-venturer shall provide a final accounting for each charitable sales promotion that it conducts to the charitable organization on whose behalf the charitable sales promotion was conducted not later than ten days after the charitable organization requests it. A commercial co-venturer shall provide to the attorney general a copy of the final accounting for each charitable sales promotion that it conducts not later than ten days after the attorney general requests it.

Section 1716.10 Point of solicitation disclosures by charitable organizations.

Every charitable organization, whether or not required to register pursuant to this chapter, that directly solicits contributions in this state shall make the following disclosures at the point of solicitation:

(A) The name of the organization and the city of the principal place of business of the charitable organization;

(B) If the charitable organization has not received a determination letter from the internal revenue service that is currently in effect, stating that the organization is exempt from federal income taxation under section 501(a) and described in section 501(c)(3) of the Internal Revenue Code, the particular charitable purpose or purposes to be advanced with the funds raised.

Section 1716.11 Records retention and inspection.

Every charitable organization, fund-raising counsel, professional solicitor, and commercial co-venturer, whether or not required to register pursuant to this chapter, shall keep true records of solicitation activities that are covered by this chapter or any rule adopted under this chapter. The records shall be made available to the attorney general for inspection and shall be furnished to him not later than ten days after his request. The records shall be retained for a period of at least three years.

Section 1716.12 Exchange of information with other states.

The attorney general may exchange any information with respect to charitable organizations, fund-raising counsel, professional solicitors, or commercial co-venturers with the appropriate authority of any other state or of the United States. The attorney general may accept any information filed by a charitable organization with the appropriate authority of another state or of the United States in lieu of the information that the charitable organization is required to file pursuant to this chapter if the information substantially meets all the requirements of this chapter.

Section 1716.13 Rules and regulations.

The attorney general from time to time may adopt such reasonable rules pursuant to Chapter 119. of the Revised Code as may be necessary to interpret or implement this chapter.

Section 1716.14 Prohibited acts and practices.

(A) The following acts and practices are hereby prohibited and declared unlawful as applied to the planning, conducting, or executing of any solicitation of contributions for a charitable organization or charitable purpose or to the planning, conducting, or executing of a charitable sales promotion:

(1) Operating in violation of, or failing to comply with, any of the requirements of

this chapter or any rule adopted under this chapter;

(2) Committing any unfair or deceptive act or practice;

(3) Using any representation that implies that the contribution is for or on behalf of a charitable organization, or using any emblem, device, or printed matter belonging to or associated with a charitable organization, without first having been authorized in writing to do so by the charitable organization;

(4) Using a name, symbol, or statement that is so closely related or similar to that used by another charitable organization, public official, or public agency in such a manner that the use of the name, symbol, or statement tends to confuse or mislead a person being solicited for contributions, except that the name, symbol, or statement may be used if written permission is obtained from the other charitable organization, public official, or public agency and filed with the attorney general prior to any solicitation for a charitable purpose or prior to engaging in any charitable sales promotion;

(5) Misleading any person in any manner in the belief, or misrepresenting to any person, that the organization on whose behalf a solicitation or charitable sales promotion is being conducted is a charitable organization or that the proceeds of the solicitation or charitable sales promotion will be used for a charitable purpose if either of those is not the fact;

(6) Misleading any person in any manner in the belief, or misrepresenting to any person, that any other person sponsors, endorses, or approves of the solicitation or charitable sales promotion when that other person has not given its consent in writing to that representation or to the use of its name for any of those purposes;

(7) Using or exploiting the fact of registration in such a manner as to lead any person to believe that the registration in any manner constitutes an endorsement or approval by the state;

(8) Representing directly or by implication that a charitable organization will receive a fixed or estimated percentage of the gross revenue from a solicitation campaign that is greater than that set forth in the contract filed with the attorney general pursuant to section 1716.08 of the Revised Code, or that a charitable organization will receive an actual or estimated dollar amount or percentage per unit of goods or services purchased or used in a charitable sales promotion, that is greater than that agreed to by the commercial coventurer and the charitable organization;

(9) Filing false or misleading information in any document required to be filed with the attorney general under this chapter;

(10) Filing false or misleading information in response to a request from the attorney general under section 1716.15 of the Revised Code;

(11) Failing to provide complete and timely payment to a charitable organization of the proceeds from a solicitation campaign or a charitable sales promotion.

(B) The act of soliciting contributions for any charitable organization or charitable purpose or engaging in a charitable sales promotion without complying with the requirements of this chapter or any rule adopted pursuant to this chapter, is a nuisance.

Section 1716.15 Investigatory powers of the attorney general.

(A) In order to carry out his responsibilities under this chapter, upon reasonable cause to believe that any person has violated or is violating any provision of this chapter or any rule adopted under it, or has filed any document as required under this chapter that contains false or misleading information, the attorney general may conduct an investigation to determine whether there has been a violation or filing of false or misleading information. In the conduct of the investigation, the attorney general may do the following:

(1) Examine or cause to be examined any person or any documentary material that is relevant to the alleged violation or false or misleading information;

(2) Require the attendance during the examination of any person or require the production of any documentary material and the attendance of any person who has knowledge of the material, and take their testimony under oath. The testimony and examination shall take place in the county

in which the person resides or has a place of business, or in Franklin county if the person consents to it, is a nonresident of this state, or has no place of business in this state.

(3) Require any professional solicitor, fund-raising counsel that at any time has custody of contributions from a solicitation, or charitable organization to produce an audited financial report prepared in accordance with generally accepted accounting principles pursuant to section 1716.04 of the Revised Code and that has been examined by an independent certified public accountant for the purpose of expressing an opinion on the report.

(B) The attorney general shall give notice of the time, date, place, and cause of the examination or the taking of testimony not less than ten days prior to its date. Service of the notice may be made by any of the following means:

(1) Personal delivery of a duly executed copy of the notice to the person to be served or to a partner, officer, or agent authorized by appointment or by law to receive service of process on behalf of that person;

(2) Delivery by leaving a duly executed copy of the notice at the principal place of business in this state of the person to be served;

(3) Certified mail, return receipt requested, of a duly executed copy of the notice to the person to be served at his principal place of business in this state or, if the person has no principal place

of business in this state, to the last address of that person known to the attorney general.

(C) The notice specified in division (B) of this section shall contain all of the following:

(1) The time, date, and place of the examination or the taking of testimony and, if known, the name and address of each person to be examined or to testify, or if that is not known, a general description sufficient to identify the person or the particular class or group to which he belongs;

(2) The section of the Revised Code, if any, or the chapter of the Administrative Code containing the rule adopted by the attorney general, if any, that is allegedly violated and the general subject matter of the investigation;

(3) A description with reasonable specificity of the class or classes of documentary material that is required to be produced, if any, and the return date within which the documentary material is to be produced, which date shall be not less than ten days after the mailing of the notice.

(D) Every person upon whom the attorney general made service of the notice pursuant to this section shall comply with the terms of the notice unless otherwise provided by order of any court in this state.

(E) No person shall do any of the following:

(1) Fail to appear at any investigation under this section if he is required to do so;

(2) With the purpose to avoid, evade, or prevent compliance in whole or in part with any investigation under this section, remove, conceal, withhold, destroy, mutilate, alter, or by any

means falsify any documentary material in the possession, custody, or control of any person who is subject to the notice prescribed in division (B) of this section;

(3) With the purpose to avoid, evade, or prevent compliance in whole or in part with any investigation under this section, knowingly conceal any information.

(F) The attorney general may file a petition in the court of common pleas of the county in which the person who is subject to the notice resides or has its principal place of business or in the court of common pleas of Franklin county if that person is not a resident of this state or has no principal place of business in this state, asking the court to issue an order for the enforcement of this section. The court may assess a civil penalty of not more than ten thousand dollars for each violation against any person who violates division (E) of this section, and may award the attorney general the costs of investigation and litigation and reasonable attorney's fees.

(G) Any disobedience of any final order issued by the court under this section may be punished as for contempt of court or by imposing an additional civil penalty of not more than ten thousand dollars.

Section 1716.16 Remedies available to the attorney general upon violation.

(A) In addition to other remedies authorized by law, the attorney general may bring a civil action to

enforce this chapter or any rule adopted under this chapter. The attorney general is not required to use any procedure prescribed in Chapter 119. of the Revised Code prior to exercising any remedy set forth in this section.

(B) Upon a finding that any person has engaged or is engaging in any act or practice in violation of this chapter or any rule adopted under this chapter, a court may make any necessary order or enter a judgment including, but not limited to, an injunction, restitution, or an award of reasonable attorney's fees and costs of investigation and litigation, and may award to the state a civil penalty of not more than ten thousand dollars for each violation of this chapter or rule, in seeking injunctive relief, the attorney general shall not be required to establish irreparable harm but only shall establish a violation of a provision of this chapter or a rule adopted under this chapter or that the requested order promotes the public interest.

(C) In any case in which the attorney general has authority to institute an action or proceeding under this chapter, he may accept an assurance of discontinuance of any method, act, or practice that is in violation of this chapter or any rule adopted under it, from any person alleged to be engaged in or to have engaged in the unlawful method, act, or practice. The assurance may include a stipulation for the voluntary payment by the person of the costs of investigation, or of an amount to be held in escrow pending the outcome of any action or as restitution to any aggrieved person or both. The assurance of discontinuance shall be in writing and shall be filed with the court of common pleas of Franklin county.

Any evidence of a violation of the assurance of discontinuance shall be prima facie evidence of a violation of this chapter or any rule adopted under it in any subsequent action or proceeding brought by the attorney general. Any matter that has been closed by the acceptance of an assurance of discontinuance may at any time be reopened by the attorney general for further proceedings in the public interest.

(D) In addition to any other sanction imposed by law, any charitable organization, fund-raising counsel, professional solicitor, commercial co-venturer, or any of their agents, or any other person that violates the terms of an assurance of discontinuance, an injunction, or any other order or judgment entered by a court under this section, shall forfeit and pay to the state a civil penalty of not more than ten thousand dollars for each violation that may be recovered in a civil action brought by the attorney general. Each violation shall be a separate offense, except that in the case of a violation through continuing failure to obey, or neglect in obeying, the order, each day of continuance of the failure or neglect shall be considered a separate offense.

(E) The civil penalties assessed under division (B) or (D) of this section or division (F) or (G) of section 1716.15 of the Revised Code shall be paid into the state treasury to the credit of the charitable foundations fund established under section 109.32 of the Revised Code.

Section 1716.17 Fiduciary responsibility.

Every person who solicits, collects, or expends contributions on behalf of a charitable organization or for a

charitable purpose, or who conducts a charitable sales promotion, and every officer, director, trustee, or employee of that person who is concerned with the solicitation, collection, or expenditure of those contributions shall be considered a fiduciary and as acting in a fiduciary capacity.

This section does not supersede or otherwise alter the standard of care or the limitations on the liability of volunteers under section 1702.30 or 2305.38 of the Revised Code.

Section 1716.99 Penalties.

(A) Whoever violates sections 1716.02 to 1716.17 of the Revised Code or any rule adopted pursuant to those sections is guilty of solicitation fraud, a misdemeanor of the first degree. If the offender previously has been convicted of solicitation fraud, he is guilty of grand solicitation fraud, a felony of the third degree.

(B) Each occurrence of a solicitation of a contribution from any person in violation of section 1716.02 to 1716.17 of the Revised Code or any rule adopted under those sections is considered a separate offense of solicitation fraud or grand solicitation fraud as the case may be.

(C) Any person who is found guilty of solicitation fraud or grand solicitation fraud shall forfeit the bond described in section 1716.05 or 1716.07 of the Revised Code to the state treasury to the credit of the charitable foundations fund established under section 109.32 of the Revised Code, and shall be prohibited from registering with the attorney general or from serving as a fund-

raising counsel or professional solicitor in this state for a period of five years after his conviction.

§ 2901.32 Improper solicitation of contributions for missing children.

(A) No organization shall solicit contribution for the purpose of distributing materials containing information relating to missing children unless it complies with all of the following requirements:

(1) It has been incorporated under Chapter 1702. of the Revised Code or the nonprofit corporation law of another state for a period of two years prior to the time of the solicitation of contributions.

(2) It has been exempt from federal income taxation under subsection 501(a) and described in subsection 501(c)(3), 501(c)(4), 501(c)(8), 501(c)(10), or 501(c)(19) of the Internal Revenue Code of 1954, 68A Stat. 3, 26 U.S.C. 1, as now or hereafter amended, for a period of two years prior to the time of the solicitation of contributions.

(3) It does not use fund-raising counsel, professional solicitors, commercial co-venturers, or other charitable organizations, as these terms are defined in section 1716.01 of the Revised Code, to solicit such contributions.

(B) No organization that solicits contributions for the purpose of distributing materials containing information relating to missing children shall expressly state or imply in any way that it is affiliated with, or is soliciting contributions on behalf of, an organization established to assist in the location of missing children without the express written consent of that organization.

(C) Whoever violates division (A) or (B) of this section is guilty of improper solicitation of contributions for missing children, a misdemeanor of the third degree.

*HISTORY: 143 v H 486. Eff 11-7-90.

Supreme Court, U.S.
FILED
MAR 22 1996
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CASE NO. 95-1295

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

DAYTON AREA VISUALLY IMPAIRED PERSONS, INC., an Ohio non-profit corporation; WAYNE COUNTY FOSTER PARENTS NETWORK, an unicorporated Ohio non-profit association; OHIO TELEMARKETING ASSOCIATION, INC., an Ohio non-profit corporation,
Petitioners,

v.

BETTY D. MONTGOMERY, Attorney General, State of Ohio; J. ANTHONY SAWYER, City Attorney of the City of Dallas, Ohio; LEE FALKE, Prosecuting Attorney, Montgomery County, Ohio,
Respondents,

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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**In accordance with Rule 35, Betty D. Montgomery is the current Attorney General and should be substituted as the named Respondent as successor to former Attorney General Lee Fisher.*

16 p/p

PARTIES TO THE PROCEEDING

Betty D. Montgomery is the current Attorney General of Ohio, and should be substituted as the named Respondent in this proceeding as the successor in interest to former Attorney General Lee Fisher.

STATEMENT OF QUESTIONS PRESENTED

1. Whether a State Legislature May Impose Greater Registration Requirements on New Professional Fundraisers Than Established Professional Fundraisers under the Free Speech Clause.

2. Whether a State Legislature May Exempt Religious Organizations from the Registration Requirements of its Charitable Solicitation Laws under the Establishment, Equal Protection and Free Speech Clauses.

3. Whether a State Legislature May Impose Point-of-Solicitation Regulations (E.g., Name, Status, Charities Involved, and If Requested, Percentage of Contributions Given to Charities) for Charitable Organizations and Professional Fundraisers under the Free Speech Clause.

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REASONS FOR DENYING THE WRIT

I. THERE IS NO LOWER-COURT SPLIT OF AUTHORITY ON THE ISSUES PRESENTED, AND THIS INTERLOCUTORY APPEAL RAISES QUESTIONS THAT THE COURT HAS ADDRESSED MANY TIMES BEFORE.

At the outset, there are several prudential reasons for denying the writ. To start with, the petition fails to raise a single issue that has divided the lower federal courts or the state courts. There simply is no split of authority on the questions presented. Under these circumstances, this simply is not a case warranting the exercise of the Court's discretionary jurisdiction. *See* Sup. Ct. R. 10.

Not only do petitioners fail to identify any lower-court conflicts demanding prompt resolution, but they also are bringing an interlocutory appeal. True, 28 U.S.C. § 1292(a)(1) permits interlocutory appeals of injunction decisions. True also, it permits limited interlocutory appeals from those decisions that are of serious and perhaps irreparable consequence. *See Carson v. American Brands, Inc.*, 450 U.S. 79, 84 (1981). But, even if this standard permitted immediate appeal of the decision below, the Court has long shown a preference for exercising its limited discretionary jurisdiction in the context of complete records developed in full hearings concluded by a final judgment. That preference is particularly appropriate in the context of preliminary injunction decisions like this one, where the legal issues are viewed through the prism of likelihood of success on the merits. *See* Petition, App. 18, 23.

Nor are the issues raised in this case ones in which

the Court has failed to give the lower courts guidance. The Court's trilogy of recent decisions, *see Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988); *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), has given state legislatures, state courts and federal courts abundant direction in this area. Having recently provided significant clarity to this area of the law, there is no pressing reason to review the issues in this case at this time.

II. THE LOWER COURTS CORRECTLY HELD THAT OHIO'S CHARITABLE SOLICITATION LAW DOES NOT VIOLATE THE FIRST AND FOURTEENTH AMENDMENTS.

A. Overview of the Statute's Constitutionality.

In addition to these prudential considerations, there is another equally prominent reason for denying the writ: The Sixth Circuit (*Doughtrey*, Engel, Norris) correctly affirmed the district court's (Rice) decision. In part because the lower courts were not writing on a clean slate in this area, they had little difficulty rejecting Petitioners' challenge to the statute.

No doubt charitable solicitations are protected by the free speech guarantees of the First and Fourteenth Amendments. But, as this Court has recognized, they still are "subject to reasonable regulation narrowly tailored to serve legitimate and substantial governmental interests." *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980). More to the point, the Court has acknowledged that state concerns in this area may be

"accommodated directly, through disclosure, registration requirements and penalties for fraudulent conduct," *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 967 n.16 (1984), and "the interest in protecting charities (and the public) from fraud is, of course, a sufficiently substantial interest to justify a narrowly tailored regulation," *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 792 (1988). Accordingly, while regulations must be narrowly tailored to advance the State's asserted interest, mandatory disclosure requirements satisfy this test. *See, e.g., id.* at 799 n.11. *See also Village of Schaumburg*, 444 U.S. at 637-38 ("[e]fforts to promote disclosure of the finances of charitable organizations also may assist in preventing fraud by informing the public of the ways in which their contributions will be employed").

Contrary to Petitioners' suggestions (Petition, at 10-13), the Ohio Charitable Solicitation Act is fully consistent with these requirements. At its core, the Act is merely a registration and disclosure law. It ensures that Ohio residents have adequate information to make decisions about charitable giving. Under the Act, charitable organizations and professional solicitors are required to file a registration statement with the Attorney General. O.R.C. §§ 1716.02 and 1716.07. Upon filing the necessary documentation, the charitable solicitor is free to solicit contributions. The statute does not require licensure or any type of permit. Nor is any waiting period imposed before a solicitation may commence. And, if for any reason the Attorney General wishes to prevent a solicitation from occurring, she must seek judicial intervention before doing so. *See* O.R.C. § 1716.16.

The Act also requires charitable organizations to file annual financial reports, and professional solicitors to file financial reports within ninety days of the close of a

particular solicitation. O.R.C. §§ 1716.04, 1716.07(E). These reports provide the public with the kind of information that is needed to make informed decisions about giving. They also provide the Attorney General with information necessary to enforce the law and to detect instances of possible wrongdoing. Notably, the Act requires charitable organizations to provide *less* information to the Attorney General than the Internal Revenue Service requires when it determines if charitable organizations are in fact fulfilling the charitable purposes for which they were organized. In the end, these modest registration requirements fall well within the ambit of permissible regulations of charitable solicitations. *See, e.g., Riley*, 487 U.S. at 788, 795; *Munson*, 467 U.S. at 967-68 & n.16; *Village of Schaumburg*, 444 U.S. at 637-38 & n.12; *Larson v. Valente*, 456 U.S. 228, 240 (1982); *Buckley v. Valeo*, 424 U.S. 1, 60-68 (1976); *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940). The Sixth Circuit was correct in so holding.

B. The Act Does Not Unlawfully Discriminate Against Small and Unpopular Charities.

In addition to their broad-based challenge to the Act, Petitioners also make several specific attacks. They initially argue (Petition, at 13-19) that the registration requirements unconstitutionally discriminate against small and unpopular charities and in favor of large, well-established charities, and contend that this alleged discrimination warrants strict scrutiny. They are wrong in several respects.

As an initial matter, the statute does not single out small charities for differential treatment. As the Sixth Circuit properly recognized, the smallest organizations -- those who raise less than $25,000 -- are not covered by the

registration and fee provisions of the Act. *See* Petition, at App. 13; O.R.C. § 1716.03(E). While the Act may distinguish between new and established charities in its registration requirements, it simply does not distinguish between small and large charities.

Next, strict scrutiny is not appropriate for such a claim. When a legislative classification does not impinge upon a fundamental right or create a suspect class, it need only be rationally related to a legitimate governmental purpose to satisfy equal protection. *See Massachusetts Bd. Of Retirement v. Murgia*, 427 U.S. 307, 312 (1976). Here, the statute's informational and anti-fraud aims plainly meet this test. Nor did Petitioners ever establish that the Act "interfered with the fundamental right to free speech." Petition, at App. 13. The exemption is content-neutral because it applies without regard to the content of the solicitations undertaken.

In the alternative, even if strict scrutiny were applied to these classifications, the Act withstands this higher level of review. *Id.* at App. 13-14. The principal classification -- between new and established charities -- is narrowly drawn to meet the compelling interest in preventing fraudulent solicitation. The challenged registration and fee requirements generally are limited in duration (two years). Plus, during this two-year period, while a legitimate track record is established the modest registration requirements help ensure that citizens are protected from fraudulent schemes. Notably, registration and reporting have been found to be among the least intrusive means of regulating protected speech. *See, e.g.*, *Riley*, 487 U.S. at 788, 795; *Munson*, 467 U.S. at 961-62; *Village of Schaumburg*, 444 U.S. at 637-38 & n.12; *Buckley*, at 60-64.

C. The Exemption for Religious Organizations Does Not Violate The Establishment, Freedom of Speech, Or Equal Protection Clauses.

Petitioners next assert (Petition, at 19-24) that the Act's exemption for "religious organizations" creates an improper establishment of religion and violates free speech and equal protection rights. The District Court, however, correctly rejected these claims. And so did the Sixth Circuit.

In *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987), this Court rejected a similar claim. Under attack in *Amos* was an exemption for religious organizations from Title VII's general prohibition against religious discrimination. In rejecting the claim, the Court held that the test articulated under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), should be used in assessing the validity of such exemptions.

The same approach governs this case. The Ohio statute (1) achieves "a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions," *Amos*, 483 U.S. at 335; (2) does not have the effect that "the *government itself* has advanced religion through its own activities and influence," *id.* at 337 (emphasis in original); and (3) avoids impermissible entanglement between church and state because it "effectuates a more complete separation of the two and avoids [any] intrusive inquiry into religious belief," *id.* at 339.

The lower courts also recognized that Petitioners' reliance on *Texas Monthly v. Bullock*, 489 U.S. 1 (1989), is

misplaced. There are two reasons. Unlike *Texas Monthly*, the legislation here also exempts some secular organizations from the registration requirements. And unlike *Texas Monthly*, this legislation does not contain a state subsidy for religious belief. The Establishment Clause simply is not violated when a statutory exemption applies to secular and religious organizations alike. *See Waltz v. Tax Comm'n*, 397 U.S. 664 (1970); *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 15-18 (1988) (rejecting equal protection attack on exemption for religious and benevolent organizations from private club ordinance); *Employment Division v. Smith*, 494 U.S. 872, 890 (1990) (religious exemption is not constitutionally prohibited); *Wickman v. Firestone*, 500 So. 2d 740, 741 (Fla. App. 1987) (upholding exemption applicable to religious organizations under Florida's charitable solicitation law).

Amos also held that when a statute meets the *Lemon* test, "we see no justification for applying strict scrutiny" with respect to equal protection claims. 483 U.S. at 339. Plainly, the exemption meets the rational-basis test, if for no other reason than that it alleviates "significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Id.* Finally, the exemption does not violate freedom of speech. The exemption serves purposes wholly unrelated to the content of the organization's speech.

D. The Point-of-Solicitation Requirements Do Not Violate Free Speech Rights.

Petitioners lastly argue (Petition, at 24-27) that the Sixth Circuit erred in upholding the Act's point-of-solicitation requirements against a free speech attack. They are

mistaken.

As an initial matter, it is important to clarify the modest nature of the Act's disclosure requirements. Prior to requesting a solicitation verbally, professional solicitors need only disclose their name, their status as a professional fundraiser, and the name and address of the charity for whom they are seeking contributions. Also, if asked by a potential donor but not otherwise, the solicitor is required to disclose the percentage of gross revenue that the charity will actually receive from the solicitation campaign. *See* O.R.C. § 1716.08(B).

Riley, to be sure, invalidated an across-the-board requirement that fundraisers in all cases disclose the percentage of charitable funds actually given by them to charity. 487 U.S. at 795-98. But, in doing so, the Court specifically approved more modest disclosure requirements like those presented here.

> The Act, as written, requires the fundraiser to disclose his or her employer's name and address. Arguably, this may not clearly convey to the donor that the solicitor is employed by a for-profit organization, for example, where the employer's name is "Charitable Fundraisers of America." However, nothing in this opinion should be taken to suggest that the State may not require a fundraiser to disclose unambiguously his or her professional status. On the contrary, such a narrowly tailored requirement would withstand First Amendment scrutiny.

Id. at 799 n.11. The Court also noted approvingly that

under a related statute not challenged in the case, fundraisers must disclose, upon request, "how much of the contribution will be turned over to the charity." *Id.* at 799. Neither the Sixth Circuit nor the district court erred in following *Riley*'s clear guidance on this point.

Petitioners also argue (Petition, at 26-27) that it is impermissible to require organizations that are not themselves tax-exempt under federal law (i.e., non-501(3)(c) organizations) to disclose the uses to which they will put any charitable contributions received. But since a charitable appeal is being used to obtain such contributions, informing the potential donor of the purposes for the donation is necessary and proper, and indeed is narrowly tailored to serve the State's legitimate interests of informing the public and preventing the misuse of charitable contributions.

CONCLUSION

Respondent respectfully asks the Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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No. 95-1295

(3)

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In The

Supreme Court of the United States

October Term, 1995

DAYTON AREA VISUALLY IMPAIRED PERSONS, INC., an Ohio non-profit corporation; WAYNE COUNTY FOSTER PARENTS NETWORK, an unincorporated Ohio non-profit association; OHIO TELEMARKETING ASSOCIATION, INC., an Ohio non-profit corporation,

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BETTY D. MONTGOMERY,* Attorney General, State of Ohio; J. ANTHONY SAWYER, City Attorney of the City of Dallas, Ohio; LEE FALKE, Prosecuting Attorney, Montgomery County, Ohio,

Respondents.

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6 pp

I. DISCRIMINATION AGAINST THE SPEECH OF SMALL AND UNPOPULAR CHARITIES.

The State[1] attempts to efface the importance of the first question presented by ignoring the issue. Yet the issue persists.

The State makes no effort to dispute, for example, that Ohio's charitable solicitation statute imposes a costly and intrusive regulatory scheme on the small or unpopular charities that must rely on outside professional fundraisers, while allowing established and popular charities to run an identical campaign with far less scrutiny and expense. (*See* Pet. 14-15.) Nor does the State dispute that the Court has expressly left open the constitutionality of such discrimination, *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 802 n.14 (1988), (*see* Pet. 13); nor does it respond to the point that the skewed playing field that results from heavy-handed regulation of outside fundraisers with no regulatory counterbalance for inside fundraisers who speak the same words is widespread among the States, (*see* Pet. 11 n.4).

The Court has observed that burdens on professional fundraisers "necessarily discriminate[ ] against small or unpopular charities." *Riley*, 487 U.S. at 799. This is a case, therefore, about State discrimination against unpopular

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[1] The only Brief in Opposition [Br. Opp.] to the Petition for Certiorari [Pet.] has been filed by Betty D. Montgomery, the Ohio Attorney General. The Attorney General was also the only party who actively defended the statute in the courts below.

speech. Whether such a scheme draws enhanced scrutiny is a question meriting review. (*See* Pet. 16-17.)

The favoritism of the Ohio statute is stark. Indeed, the entire scheme of regulation of outside professional fundraisers has no counterpart for charities with inside professional fundraisers. (*See* Pet. 6-9.)[2]

The State's principal claim is that organizations that raise less than $25,000 are not covered by the statute. (Br. Opp. 4-5.) The argument is a non sequitur since it does not address the central point – the differential regulation,

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[2] The latter, for example, do not need to give the names and addresses of staff, disclose internal financial arrangements, or publish individuals' criminal records. The former must do all these things. *See* Ohio Rev. Stat. § 1716.07(B).

Groups using outside fundraisers must come up with a $25,000 bond, § 1716.07(C), a costly item that may also be difficult to obtain. Groups with in-house professional fundraisers need no such thing. The same is true for the detailed "solicitation notice" that outside fundraisers are required to file. § 1716.07(D). Inside fundraisers need not disclose any of the seven categories of information contained in this document. They are also exempted from post-campaign financial reporting of § 1716.07(E).

Only outside professional fundraisers must keep enormous quantities of records, § 1716.07(G)(1), and submit to onerous requirements when tickets are sold, § 1716.07(G)(2). Criminal records can prohibit people from working for outside, but not inside, fundraisers. § 1716.07(I). Outside but not inside professional fundraisers must engage in state-imposed cost accounting, § 1716.08(A), and disclosure, § 1716.08(B). Outside but not inside fundraisers must obtain written consents from other organizations, § 1716.08(C), and comply with detailed regulations regarding donation of tickets, § 1716.08(D).

with all that it entails, of groups using inside fundraisers versus those using outside fundraisers. (*See* Pet. 15 n.6.)

The State's attempt to justify the statute under strict scrutiny fails. It asserts: "The principal classification – between new and established charities – is narrowly drawn to meet the compelling interest in preventing fraudulent solicitation." (Br. Opp. 5.) As the Plaintiffs have shown, (*see* Pet. 18-19), this formulation at once demonstrates that strict scrutiny is being applied in name only, and that the classification cannot survive strict scrutiny in fact. The notion that "new" charities – even given the State's tacit reading out of *Riley*'s "unpopular" charities – are categorically more prone to "fraudulent solicitation" is unjustified speculation. *Cf. Larson v. Valente*, 456 U.S. 228, 248-51 (1982) (rejecting State's "assumption" that religious organizations that receive more than half their funds from the public are more likely to engage in "abusive solicitations of the public").

At bottom, as was the case in *Riley*, the State's assertion "amounts to little more than a variation of the argument rejected in *Schaumburg* and *Munson* that the provision is simply an economic regulation with no First Amendment implication, and therefore must be tested only for rationality." 487 U.S. at 790. Now, years after *Riley*, however, Ohio and other States continue to enact legislation based on just such premises. It is time once again to make clear that such "regulation burdens speech, and must be considered accordingly." *See id.*

II. FAVORING OF RELIGIOUS SPEECH.

As Plaintiffs have noted, the religious exemption in the statute raises significant issues of accommodation of religion – issues that lie at the roiled confluence of *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), and *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987). (*See* Pet. 19-20.) The State's response, citing *Walz v. Tax Comm'n*, 397 U.S. 664 (1970), is that the "statutory exemption applies to secular and religious organizations alike." (Br. Opp. 7). *Walz*, however, does not solve the problem. The State fails to account for the fact that the religious exemption is the statute's *only* per se exemption; all the others are based on some functional or operational characteristic. (*See* Pet. 20-21.)[3] Indeed, the sales tax exemption in *Texas Monthly* did not apply only to religious periodicals either, but to a large number of other goods. The State also interposes no defense of the religious exemption's overinclusiveness even on the premise of accommodation. (*See* Pet. 21.)

III. COMPELLED SPEECH.

On the statute's compelled disclosures, the State relies almost entirely on dicta in a footnote in *Riley*, 487

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[3] *See* § 1716.03(B) (organizations that have already registered under § 109.24 and meet other criteria); § 1716.03(C) (educational institutions "when solicitation is confined to alumni, faculty, trustees, or the student membership and their families"); § 1716.03(D) (solicitations confined to organizations' members, employees, or trustees); § 1716.03(E) (I.R.C. § 501(c)(3) organizations with less than $25,000 in annual gross revenue).

U.S. at 799 n.11. (Br. Opp. 8-9.) But the Plaintiffs have shown that only an unwarranted *expansion* of these dicta – themselves controversial both on the Court and among commentators – can justify the Ohio statute. (Pet. 24-26.) Such proliferating regulatory overreaching in this First Amendment sphere is no "modest," (Br. Opp. 8), matter, but "compelled speech," *Riley*, 487 U.S. at 796, that may "hamper the legitimate efforts of professional fundraisers to raise money for the charities they represent," *id.* at 799.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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